Juvenile Division of the Circuit Court for Baltimore City | Baltimore, MD
Judicial Intern *Sep. 2022–Dec. 2022*
Conducted legal research in the areas of juvenile delinquency and child welfare to support the work of six magistrates in the Juvenile Division. Observe Child in Need of Assistance and delinquency hearings.

Federal Public Defender for the District of Maryland | Baltimore, MD
Legal Intern *May 2022–Aug. 2022*
Assisted with the defense of indigent clients in the federal criminal system by conducting research and drafting legal filings including motions to suppress evidence, grant compassionate release, and terminate supervised release. Attended client meetings and court proceedings.

PUBLICATIONS

The Larry Nassar Hearings: Victim Impact Statements, Child Sexual Abuse, and the Role of Catharsis in Criminal Law, 82 MD. L. REV. 782 (2023), https://digitalcommons.law.umaryland.edu/mlr/vol82/iss3/7/.

COMMUNITY INVOLVEMENT

Maryland Public Interest Law Project | *Co-Treasurer* *Aug. 2020–Present*
Oversee a budget of $150,000 for a student-run 501(c)(3) nonprofit dedicated to providing grants to students pursuing unpaid summer public interest internships.

University of Maryland Carey School of Law | *Peer Advisor* *May 2023–Present*
Provide mentorship and academic support to first-year law students.

Maryland Parole Project | *Legal Volunteer* *Dec. 2021–Feb. 2022*
Reviewed and summarized trial documents to help prepare an exoneration argument for a client convicted of murder. Contributed to a guide to the parole process for lawyers representing individuals serving life sentences.

Student Bar Association | *Evening Class Vice President* *Sep. 2020–May 2023*
Served as a liaison between the evening class, the student body, and the school administration. Planned class activities and events.

REFERENCES

Professor Leslie Meltzer Henry
Professor, University of Maryland Carey School of Law
703-599-7860 | lmeltzer@law.umaryland.edu

Professor Peter Danchin
Professor and Director of International & Comparative Law Program, University of Maryland Carey School of Law
443-527-0377 | pdanchin@law.umaryland.edu

Professor Michael Millemann
Professor, University of Maryland Carey School of Law
410-294-0954 | mmillem@law.umaryland.edu

Professor William Moon
Assistant Professor, University of Maryland Carey School of Law
203-392-4466 | wmoon@law.umaryland.edu

Ms. Dana Vickers Shelley
Executive Director, ACLU of Maryland
410-980-3754 | dana@aclu-md.org

Ms. Laura Abelson
Assistant Public Defender, Office of the Public Defender for the District of Maryland
443-851-0903 | laura_abelson@fd.org

(/StudentSelfService/)

Ms. Rosemary Nadia Ardman

Student Academic Transcript

Academic Transcript

Transcript Level

School of Law

Transcript Type

Academic Record

Student Information | Degrees Awarded | Institution Credit | Transcript Totals | Course(s) in Progress

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Student Information

Name

Rosemary Ardman

Curriculum Information

Current Program : Juris Doctor

Program	Major and Department
Law Evening	Law, Law

Degrees Awarded

In Progress

Juris Doctor

Curriculum Information

Primary Degree

Major

Law

Institution Credit

Term : Fall 2020

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	506E	LW	CRIMINAL LAW	A+	3.000	12.99		
LAW	527E	LW	CIVIL PROCEDURE	A	4.000	16.00		
LAW	550E	LW	INTRODUCTION TO LEGAL RESEARCH	A	1.000	4.00		
LAW	564E	LW	LAWYERING I	A	2.000	8.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	40.99	4.10
Cumulative	10.000	10.000	10.000	10.000	40.99	4.10

Term : Spring 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	534E	LW	PROPERTY	A	4.000	16.00		
LAW	558H	LW	LEGAL PROFESSION	A+	3.000	12.99		
LAW	565E	LW	LAWYERING II	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	40.99	4.10
Cumulative	20.000	20.000	20.000	20.000	81.98	4.10

Term : Fall 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	528E	LW	CON LAW I: GOVERNANCE	A+	3.000	12.99		
LAW	530E	LW	CONTRACTS	A	4.000	16.00		
LAW	566E	LW	LAWYERING III	A+	3.000	12.99		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	41.98	4.20
Cumulative	30.000	30.000	30.000	30.000	123.96	4.13

Term : Spring 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	514Q	LW	COMP JURIS SEM:TRANSCULTURE	A	3.000	12.00		
LAW	529A	LW	CON LAW II: INDIVIDUAL RIGHTS	A+	3.000	12.99		
LAW	535E	LW	TORTS	A+	4.000	17.32		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	42.31	4.23
Cumulative	40.000	40.000	40.000	40.000	166.27	4.16

Term : Summer 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	563M	LW	SPEC TOP IN COMP CONST'L DEMOC	CR	2.000	0.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	2.000	2.000	2.000	0.000	0.00	
Cumulative	42.000	42.000	42.000	40.000	166.27	4.16

Term : Fall 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	515D	LW	CRIMINAL PROCEDURE	A	3.000	12.00		
LAW	531C	LW	MARYLAND LAW REVIEW	CR	1.000	0.00		I
LAW	544S	LW	ASPER JUDICIAL EXT WORKSHOP	CR	1.000	0.00		
LAW	554F	LW	EMPLOYMENT LAW	A+	3.000	12.99		
LAW	579B	LW	EXTERNSHIPS	CR	2.000	0.00		
LAW	595S	LW	ENV JUS, HUMAN RGTS & PUB HLTH	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	13.000	13.000	13.000	9.000	36.99	4.11
Cumulative	55.000	55.000	55.000	49.000	203.26	4.15

Term : Spring 2023

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LAW	503C	LW	INTERNATIONAL LAW	A+	3.000	12.99		
LAW	505S	LW	REPRODUCTIVE JUSTICE & LAW SEM	A+	3.000	12.99		
LAW	506F	LW	ADVANCED LEGAL RESEARCH	A-	1.000	3.67		
LAW	528K	LW	HLS:COMP HLTH LAW & POLICY	A+	3.000	12.99		
LAW	531C	LW	MARYLAND LAW REVIEW	CR	1.000	0.00		I

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	11.000	11.000	11.000	10.000	42.64	4.26
Cumulative	66.000	66.000	66.000	59.000	245.90	4.17

Transcript Totals

Transcript Totals - (School of Law)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	66.000	66.000	66.000	59.000	245.90	4.17
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.00
Overall	66.000	66.000	66.000	59.00	245.90	4.17

Course(s) in Progress

Term : Fall 2023

Subject	Course	Level	Title	Credit Hours	Start and End Dates
LAW	531C	LW	MARYLAND LAW REVIEW	4.000	
LAW	544K	LW	INTERNATIONAL LABOR LAW: SEM	3.000	
LAW	578B	LW	EVIDENCE	3.000	
LAW	583F	LW	FEDERAL COURTS	3.000	

June 07, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am honored to recommend Ms. Rosemary Ardman for a federal or state judicial clerkship. Excellence Scholarship. Ms. Ardman was a student in the Constitutional Law sequence that I taught at the University of Maryland Carey School of Law during the 2021-22 academic year. She was also a student in the joint Maryland/Galway Comparative Constitutional Democracy I taught in Ireland with Professors Ioanna Tourkochoriti and Peter Danchin. Ms. Ardman's performance in the Constitutional Law sequence was spectacular. She earned an A+ in both Constitutional Law I (Governance, Fall 2021) and in Constitutional Law II (Rights, Spring 2022). She had the highest examination grade in the fall semester and in the spring semester. This is the best two semester performance of any student I have taught in twenty years at the law school. Ms. Ardman exhibited the same high standards in Ireland. Although the class was graded pass-fail, she demonstrated preparation and acumen equal to many of the younger scholars who presented in the class. Ms. Ardman is not simply the strongest student I will be recommending this year; she is high in the top-five of any student I have ever recommended for a clerkship.

Ms. Ardman was a star in both Constitutional Law I and Constitutional Law II, even before the examination. Her attendance was perfect in mind and body. Every class she sat in the fifth row, left hand side (from my perspective, from her perspective, she was on the right-hand side). Evening classes at Maryland are often quite talkative, and the 2021-22 class was no exception. Even when we were on Zoom, Ms. Ardman consistently volunteered in class. She was particularly active and articulate when women's issues were raised. She is a committed supporter of abortion rights and comparative worth. Nevertheless, Ms. Ardman was happy to share her opinions on issues as diverse as whether Wayfair could escape South Dakota's sales tax (dormant commerce clause) and when environmental regulations are inconsistent with the commerce clause. She was one of the most respected voices in the class. Ms. Ardman was as poised and intelligent when called upon in class. I use an expert system. Students are notified beforehand that they are expected to be experts on at least three cases each semester. We then have an approximately fifteenth minute discussion on case facts, case theories, case holdings and case consequences. Ms. Ardman was excellent in all of these dimensions. She could explain case facts to a person who had no clue who the parties were, detailed the legal strategies both sides used, discussed the central themes in all opinions, and give her views on whether the case was rightly decided. Her summaries were crisp and to the point. Her arguments were persuasive without being polemical.

Ms. Ardman's final examinations did not disappoint, to say the least. My final examinations consist of three parts. The first is a multiple choice, which frankly is designed to ensure that anyone who did the reading passes the course. I think Ms. Ardman got no more than 2-3 questions wrong out of 60. The second is the classic law school issue spot. I give students a hypothetical and ask them to identify possible constitutional violations. Ms. Ardman had no problem identifying the correct clauses, correct precedents, and correct tests. I threw a few tricks at the students (burying, for example, a state action problem in a free speech case). Ms. Ardman saw through me. Hers were the rare examinations that saw every issue. I suspect most of the very minor deductions reflected my desire to find some excuse to take off points somewhere. Ms. Ardman really shone on the take home portion of the class. On this part, I ask students to be advocates, making the strongest arguments for their positions. In the spring, I asked students that on the assumption that Dred Scott was wrongly decided, Lochner was wrongly decided, and Brown was rightly decided, should the Supreme Court overrule Roe v. Wade (by coincidence the final occurred the day the draft opinion leaked). Ms. Ardman penned a terrific essay. She pointed out that Taney claimed to be an originalist, so one should not use originalism to resolve fundamental rights problems, that personal rights at stake in abortion cases differed from the economic rights at stake in Lochner, and that Brown properly understood was about dismantling status hierarchies. In short, the cases everyone in the legal profession agrees were wrongly decided and those the profession agrees are rightly decided, all involved principles that Ms. Ardman maintained justified keeping abortion legal. The essay was well-organized and demonstrated a powerful grasp of how lawyers use canonical and anti-canonical cases in the past to advance their present causes.

Ms. Ardman really shone in the Ireland program. Students were expected to participate in a professional conference on the comparative law of religion and anti-discrimination law, then attend and comment on a number of faculty presentations. No one not looking at the name tags would know that Ms. Ardman was a student and not an assistant professor. She came to each presentation prepared to discuss some fairly complex papers. She developed a nuanced understanding of the problems of protecting both religion and minorities. I particularly remember her comments on the Jewish Day School case in the United Kingdom. The Jewish Day School is a very elite private school that insists Jews either have Jewish mothers or have a conversion ceremony. Ms. Ardman noted that this was discrimination based on birth, that the Jewish Day School received considerable state benefits, so could not so discriminate, even though the school accepted under different standards non-Jewish standards. Her ability to navigate the differences between discrimination law in the United States and the United Kingdom was superb, as was her sensitivity to all sides of the issues. As noted in a previous paragraph, Ms. Ardman has opinions and holds many of them strongly, but she is able to articulate them professionally in ways that show respect for all persons. Many scholars credited Ms. Ardman's comments with improving papers they will be publishing in a forthcoming academic volume.

I have reviewed Ms. Ardman's record and writings before writing this letter, and both are nothing short of amazing. Her GPA at Maryland Carey is not only close to perfect, but she has had the highest grades in at least half the classes she has taken. Her student note on the Larry Nassar hearings would be a plus on the tenure file of a faculty member. Ms. Ardman explores the role of

the testimony of childhood sexual abuse in the sentencing of a doctor who abused one girl after another as team physician for USA Gymnastics. The paper is sophisticated on law, philosophy, and psychology. Ms. Ardman recognized the powerful effect of testimony of the victims of Nassar's abuse, but she points out that the focus on Nassar's abuse shone the spotlight exclusively on Nassar and not on the numerous social conditions that should have been known that might have ended the abuse earlier. Everyone's desire for medals had powerful effects shutting people's eyes to what should have been obvious. As long as Americans continue to emphasize winning Olympic goal, abusive relationships in women's sports are likely to continue. This is a paper that merits a very wide audience for the conclusion, for the painstaking research that supported the conclusion, and for the excellent writing.

In short, Ms. Ardman is one of the strongest and possibly the strongest candidate Maryland Carey Law has had for a clerkship in a very long time. I cannot recall a single student who got the highest grade in both of my classes, not to mention the highest grade in about eight other classes. Ms. Ardman has done this while holding down a full-time job, being active in the Maryland Public Interest Community, and writing a superb law review note. She is now the incoming editor of the Maryland Law Review. She has all the attributes of a successful clerk. She manages time well. She expresses herself clearly in speech and writing. She can grasp and explain sophisticated concepts to the unwashed. As important, she is a charming individual. She was a delight to work with. For all these reasons and many more, Ms. Ardman has the strongest recommendation I can give for a federal or state judicial clerkship.

If there is any more information you need about this outstanding young lawyer in the making, I can be reached at the University of Maryland Carey School of Law (500 W. Baltimore Street, Baltimore, MD 20201), at 410-706-2767 or at mgraber@law.umaryland.edu. Thank you for your kind consideration.

Yours truly,

Mark A. Graber
Regents Professor
UM Carey School of Law

Dear Judge,

I am writing this letter with the highest of enthusiasm in support of the application of Rosemary Ardman, who is seeking a clerkship in your chambers. Rosemary is one of the best students that I have taught in my over twenty-five years as a law professor. She is an incisive and creative thinker, her analytic and communication skills are outstanding, and she is exceptionally motivated and personable – qualities that I believe, would make an outstanding judicial clerk.

I met Rosemary in Spring 2022, when she was a first-year evening student in my Torts class at the University of Maryland Carey School of Law. She has also taken two additional courses with me, and I have gotten to know her a bit outside of the classroom.

Rosemary stood out early in the Torts class as an exceptionally bright student performing impressively in all aspects of the course. She received the highest grade for class participation, was consistently well prepared and able to answer any question I put to her. Also, her performance on the exam was exceptional, leading her to receive the highest grade in the class – A+.

This past fall (2022), Rosemary was a student in a course I co-taught, entitled "Environmental Justice, Human Rights and Public Health." The course is innovative in that half of the students are from the University of Maryland Carey School of Law and half from Chancellor College at the University of Malawi, where they are starting an Environmental Law Clinic. There were 14 students in the class last fall. Students at Maryland participated together in a classroom, but everyone was also on Zoom in order that students from Malawi could participate. Lecturers were from Maryland faculty as well as faculty, judges and legal practitioners from Malawi and South Africa. Again, Rosemary stood out among the students. She was always prepared and asked astute and interesting questions of the speakers. Her intellectual curiosity stood out among all the students. For their final projects, the students from Maryland and Malawi worked in teams to address an environmental, human rights and/or public health problem facing Malawi. The students drafted papers recommending legal strategies to accomplish stated goals on various issues including deforestation, air degradation from cook-top stoves, sewage pollution from non-functioning sewage treatment plants, and pollution of a river used by area residents for bathing and cleaning. Rosemary's group did a stellar job on their paper and Rosemary received an A for the course. It was the consensus of all three faculty for the seminar that Rosemary was an exceptional student.

In addition to the fall 2022 course, Rosemary was a student this past Spring semester (2023) in my Comparative Health Law seminar, which has 14 law students and four medical students. Again, Rosemary was a standout student in terms of class participation. I counted on her as the law student in the class who could explain Tort, Constitutional and other legal concepts to the medical students in the class. She has a good grasp of the law and is able to explain it clearly to students who lack a legal background. Rosemary's seminar paper, Mental Illness and Medical Aid in Dying: A Comparative Legal Analysis of Assisted Dying for Psychiatric Patients in Belgium, Canada, Switzerland, and the United States, was hands down the best paper in the class. She did an exemplary job describing the law and its history in each country on whether to permit individuals with a mental illness to participate in physician assisted dying. Further, she critically evaluated the strengths and weaknesses of each country's approach to the contentious issue, scrutinized the case law on the topic and identified gaps in legal reasoning as well as the implications of permitting individuals with mental illness to take advantage of this "service." She is a strong and persuasive writer and received the highest grade in the class on her paper as well as for the Seminar as a whole, i.e., an A+.

Rosemary's intellectual curiosity and capacity has not only impressed me but also other members of the faculty who have had her as a student. She is one of those students that faculty discuss because they are so impressed with their intellectual capacity. Last semester I was a member of our Appointments Committee, and we brought in numerous candidates who we were considering in the hiring process. As part of that process, we ask a handful of students to meet with each candidate. When we were looking for students to meet with one candidate, I immediately thought of Rosemary as I knew she would have no problem engaging with the candidate in a sophisticated manner, asking her not only about her teaching style and rapport with students, but also about her research and scholarship. She did not disappoint. In fact, she read the job talk paper of the candidate in advance of meeting with her and asked her probing questions about it.

I believe Rosemary's success in law school thus far reflects the exceptional potential that she has demonstrated in my classes. In addition to her high standing in her law school class she was recently elected editor of the Maryland Law Review. Rosemary's work at the ACLU, her internships at the public defender's office and the Juvenile Division of the Baltimore City Circuit Court also indicate a serious intent to pursue a career in law. She is a motivated and disciplined student who will without a doubt be a successful advocate.

I also believe that Rosemary has both the dedication and the intellectual acumen to be an outstanding judicial clerk. She is not only one of the brightest students that I have taught, she is one of the most collegial and personable and no doubt would be an asset to your chambers. I therefore recommend her highly and without reservation to be your judicial clerk.

Please do not hesitate to contact me if there is any further information that I can provide.

Sincerely,

Diane E. Hoffmann
Jacob A. France Professor of Health Law
Distinguished University Professor

Diane Hoffmann - dhoffmann@law.umaryland.edu - (410) 706-7191

Anne-Marie Carstens
Director of Lawyering &
Law School Assistant Professor
acarstens@law.umaryland.edu

June 5, 2023

Re: Judicial Clerkship Applicant Rosemary Ardman

The Honorable Juan Sanchez
James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Juan Sanchez:

I am writing to enthusiastically recommend Rosemary Ardman—recently elected Editor-in-Chief of the *Maryland Law Review*—for a judicial clerkship in your chambers. Rosemary currently maintains a 4.15 GPA, an impressive feat made possible by earning the coveted A+ top grades. Even more impressive, though, she has accomplished these credentials while working full-time at the ACLU Maryland. Her ability to balance these two particularly challenging tasks side-by-side shows her brilliance and ability to manage competing responsibilities. In addition, she is, quite simply, one of the most generous and engaging law students in our community.

Rosemary easily possesses the writing, analytical, and leadership skills to succeed in a clerkship. I have gotten to know her well over the past two+ years, in two capacities. FirsDear Juan Sanchez:t, she was the No. 2 student in my Civil Procedure class during Fall 2021, which took place online due to the coronavirus and in which she missed the top spot by the thinnest of hairs. She was always prepared, made thoughtful contributions to our classroom conversations, and demonstrated her facility with analytical puzzles and difficult doctrines. Second, I have worked closely with Rosemary over the past two years as a legal writing fellow in our student fellows program, which I supervise. She has always been willing to pitch in to solve every exigency—a student seeking writing support during the middle of the exam period at a professor's urging, for example—and maintains a genuine predisposition toward helping others.

Rosemary also has a very personal and compelling backstory that forced her to develop self-sufficiency at a very young age. Suffice it to say that she has thrived and succeeded against daunting odds.

Despite this, and as suggested above, Rosemary radiates an engaging and warm nature that make her an ideal candidate for sharing the close quarters of a judicial chambers. I am always glad to see her in the halls and feel invested in her success for her commitment to being not only the best law student, but also the best community supporter she can be.

I hope you will consider Rosemary for a clerkship in your chambers, for which I recommend her whole-heartedly. Please contact me if you have any questions.

Sincerely,

Anne-Marie Carstens
Director of Lawyering & Law School Assistant Professor

Rosemary Ardman
1300 Saint Paul St. #5, Baltimore, MD 21202
rardman@umaryland.edu | 512-815-6058

Writing Sample #1

The following writing sample is a portion of an internal memorandum written for a summer internship with the Federal Public Defender for the District of Maryland. Our client was convicted of drug trafficking conspiracy for transporting large quantities of marijuana. He initially retained the services of a lawyer known for publicity stunts, and his counsel advised him to reject a generous plea offer in favor of a jury trial, which counsel was confident would result in acquittal due to the popularity of marijuana legalization. Our client was convicted at trial and received a lengthy prison sentence. Our office took over his case and sought a new trial, arguing our client's previous attorney performed deficiently under the Sixth Amendment. In the following memorandum, I set out the best strategy for asserting that our client received ineffective assistance of counsel during plea negotiations. The work is entirely my own with no editing from others.

Analysis

The Sixth Amendment guarantees criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To provide proficient representation, counsel must perform "within the range of competence demanded of attorneys in criminal cases." *Strickland*, 466 U.S. at 687-88 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Though the Court has not set out specific guidelines, an attorney's conduct must accord with prevailing professional norms during all critical phases of the proceedings, including plea negotiations. *Missouri v. Frye*, 566 U.S. 134, 140 (2012); *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). To successfully raise an ineffective assistance of counsel claim, *Strickland* sets out a two-pronged standard. 466 U.S. at 687. A defendant must show, first, that counsel performed deficiently and, second, that this prejudiced the case's outcome. *Id.*

I. CLIENT's Sixth Amendment right to effective counsel was violated by his attorney's unreasonable advice during plea negotiations, which led CLIENT to reject a plea offer far less severe than the sentence range he now faces.

CLIENT's previous attorney's failure to reasonably advise him regarding the plea deal constitutes deficient performance under the Sixth Amendment, and this prejudiced the outcome of his case because CLIENT would have otherwise accepted the plea and now faces a significantly longer sentence. Counsel's obligation to perform proficiently applies not only at trial, but during "all 'critical' stages of the criminal proceedings," particularly pretrial plea negotiations. *Frye*, 566 U.S. at 140 (quoting *Montejo v. Louisiana*, 566 U.S. 778, 786 (2009)). As the Supreme Court articulated in *Lafler*, "[C]riminal justice today is for the most part a system of pleas, not a system of trials." 566 U.S. at 170. With ninety-seven percent of federal convictions resulting from guilty pleas, "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing

convictions and determining sentences." *Id.*; *see Frye*, 566 U.S. at 143-44. When advice by counsel leads a client to reject a plea offer, the *Strickland* test for ineffective assistance requires demonstrating, first, that the advice fell below a reasonable professional standard and, second, that the defendant would have received a better outcome had he accepted the plea. *See Lafler*, 566 U.S. at 174.

A. CLIENT's counsel performed deficiently by misunderstanding fundamental legal issues, making unreasonable predictions about trial outcomes, and giving contradictory advice.

CLIENT's counsel's strategy rested on a deep misunderstanding of Maryland constitutional law and an absurd faith that a jury would nullify CLIENT's verdict due to the popularity of marijuana legalization. To deliver constitutionally sufficient assistance, an attorney must "provide . . . competent and fully informed advice, including an analysis of the risks that the client would face in proceeding to trial." *Burt v. Titlow*, 571 U.S. 12, 25 (2013) (Sotomayor, J., concurring). While courts generally presume that an attorney performed acceptably, the lack of basic competence regarding legal analysis and advice constitutes defective representation. *Dodson v. Ballard*, 800 F. App'x 171, 177 (4th Cir. 2020). For example, counsel's failure to perform relevant research, raise important issues, or generally demonstrate "legal competence" deprives a client of the right to counsel. *United States v. Carthorne*, 878 F.3d 456, 466 (4th Cir. 2017). Lawyers may reasonably pursue a variety of strategies, but courts' deference to attorneys' tactics does not apply when a decision "made no sense or was unreasonable." *Id.* at 467 (citing *Vinson v. True*, 43656 F.3d 412, 419 (4th Cir. 2006)). Likewise, though an erroneous prediction alone is not ineffective assistance, patently unrealistic advice about likely trial outcomes violates a defendant's Sixth Amendment rights. *See Steele v. United States*, 321 F. Supp. 3d 584, 590 (D. Md. 2018) (finding that counsel's inaccurate advice to defendant "as to the realities of the

sentence he faced or the odds stacked against him" was ineffective assistance); *United States v. Stockton*, No. MJG-99-0352, 2012 WL 2675240, at *11-12 (D. Md. July 5, 2012) (stating that counsel must not advise a client to reject an offer based on the "manifestly erroneous" opinion that the client will not be convicted at trial).

Unreasonable advice during plea negotiations meets the defective performance prong of the *Strickland* standard. *Lafler*, 566 U.S. at 174. Advice based on a misunderstanding of the law is the quintessential example of such a deficiency. *United States v. Freeman*, 24 F.4th 320, 326 (4th Cir. 2022) (en banc). In *Dodson*, the defendant faced a potential life sentence for felony burglary and misdemeanor domestic battery, and he received an offer to plead guilty in exchange for a recommended sentence of two to eleven years. 800 F. App'x at 173. Counsel mistakenly believed that the burglary charge included a "breaking" element and advised the defendant to reject the plea because no breaking had occurred. *Id.* at 174-75. The Fourth Circuit found that this "deficient advice" and "lack of knowledge of the pertinent law" was a constitutionally defective performance. *Id.* at 180. Similarly, in *Lafler*, all parties conceded that counsel was deficient when the defendant's lawyer told him that he could not be convicted of attempted murder because he had only shot the victim below the waist. 566 U.S. at 161, 163. And in *United States v. Swaby*, an attorney's failure to realize that his client would be deported if he accepted a plea deal—a mistake that occurred because the attorney read an old version of the relevant statute—constituted ineffective representation. 855 F.3d 233, 240 (4th Cir. 2017).

Beyond explicit legal mistakes, an attorney's inaccurate predictions can constitute defective performance if sufficiently unreasonable. *See United States v. Mayhew*, 995 F.3d 171, 177-78 (4th Cir. 2021); *Steele*, 321 F. Supp. 3d at 588-90. In *Mayhew*, a lawyer's alleged assurances that the defendant would only receive a two-to-five-year sentence if he went to trial

breached the defendant's right to effective counsel when the defendant in fact received a sentence of twenty-six years and had faced a maximum sentence of even longer. 995 F.3d at 177-78. Likewise, in *Steele*, an attorney advised her client to reject an eight-to-ten-year plea deal in a drug conspiracy case because she unreasonably expected the success of a motion to suppress evidence and inaccurately believed that this issue could not be preserved for appeal if the client pled guilty. 321 F. Supp. 3d at 588-90. The District Court for the District of Maryland found that, "[Counsel] was overly confident in her ability to secure an acquittal . . . . She did not accurately manage her client's expectations, and she failed to remediate the obvious deficiencies in her familiarity with this jurisdiction and defense advocacy generally." *Id.* at 589. Further, though the client initially suggested he would only accept a plea for less than eight years, he eventually "begged his attorney to obtain a plea offer for him," which she failed to do. *Id.* at 592. The court found that "her failures to properly advise him throughout the critical pretrial stages, to adequately engage in the plea bargaining process, and to obtain a plea offer when her client pleaded for one" rendered her performance defective. *Id.* at 593.

In the present case, CLIENT's previous counsel provided advice that ranged from unrealistic to plainly incorrect. His legal strategy rested almost entirely on jury nullification, and his belief in the likely success of this approach stemmed partly from a mistake regarding state constitutional law. In a call in late February, about two weeks after CLIENT rejected a six-year plea, his then-attorney asserted that the Maryland Constitution gives the jury the power "to judge whether a law is just" and described this as "a real footing for the type of thing we're going to be doing at trial." *See* Call on 2/25/21. This is true in a sense: The Constitution of Maryland states that "the Jury shall be the Judges of Law, as well as of fact." Md. Const. Decl. of Rts. art. 23. However, a series of court cases beginning in the 1980 rejected the plain meaning of Article 23

and held that all but a few, limited legal questions "are for the judge alone to decide." *Unger v. State*, 48 A.3d 242, 244-45 (Md. 2012) (citations omitted). Jury instructions based on Article 23—which had stated that the jury was the judge of the law and all other instructions were "advisory-only—were ultimately found unconstitutional. *Id.* at 417. Counsel's understanding of the jury's authority was therefore completely incorrect, a legal mistake of the kind and degree that made counsel's performance defective in *Dodson* and *Swaby*. Though it is unclear to what extent this informed counsel's strategy—he appears to have only mentioned it after CLIENT rejected the plea deal—the error exemplifies his professional incompetence regarding federal criminal defense and falls well outside the range of constitutionally permissible advice.

Moreover, apart from this misunderstanding of the law, CLIENT's attorney provided unreasonable advice throughout the pretrial stage based on his unjustifiable belief that a jury would not convict CLIENT because of the popularity of marijuana legalization. Though CLIENT faced a ten-year mandatory minimum and maximum sentence of life in prison, his attorney even advised him that he would receive a better outcome by getting convicted at trial than accepting the government's plea offer, which began at eight years and was eventually reduced to six. *See* Call on 10/13/20 ("It's hard for me to see, even worst case scenario, them getting even near the eight they're asking you to plea to."); Call on 5/28/21 ("You're not going to get 15 years. That's not going to happen, just so you know."). While he did say at times that the government's final six-year offer was "good," he also continued counseling CLIENT that likely changes to federal drug law and the probability of jury nullification made a trial the best option. *See* Calls from 12/29/21 to 2/16/22.

In some ways, this erratic advice is less obviously defective than counsel's mistake regarding the jury's legal authority. In other respects, however, this guidance is just as

egregiously incompetent. Despite understanding the elements of the charge, extent of the incriminating evidence, and CLIENT's sentence exposure, his attorney continued to baselessly insist that CLIENT would get the best results by going to trial. Like the attorney in *Steele*, whose absurd conviction in her ability to suppress key evidence led her client to reject a guilty plea, counsel's confidence in a favorable trial outcome was untethered from both fact and legal doctrine. That this opinion rested on the belief that he could convince a jury to not follow the law makes the strategy even more alarmingly deficient. If he at times vacillated and warned CLIENT that he risked a longer sentence at trial, *see* Call on 12/3/21, this contradictory advise only exacerbates his failure to provide the "competent . . . fully informed advice" about the merits of the plea deal, which the Constitution requires. *Burt*, 571 U.S. at 25 (Sotomayor, J., concurring). Though ineffective assistance claims have not previously been based on inconsistent advice, the absence of such cases further highlights counsel's blatant—and at times bizarre—incompetence in handling CLIENT's case. In short, CLIENT was deprived of the reasonable assistance guaranteed by the Sixth Amendment.

B. CLIENT's testimony that he would have pled guilty if not for counsel's advice, his history of deferring to counsel, and the objective benefits of the plea demonstrate that he was prejudiced by counsel's deficient performance.

The second prong of the *Strickland* standard requires the defendant to establish that the attorney's deficient performance prejudiced the outcome of the case. 466 U.S. at 687. This requires a "reasonable probability"—in other words, "a probability sufficient to undermine confidence in the outcome"—that the result of the proceedings would have been different but for counsel's errors. *Id.* at 694. In the context of a rejected plea deal, the defendant must demonstrate the reasonable probability that he would have entered a plea deal with less severe terms than the ultimate sentence. *Lafler*, 566 U.S. at 164. Additionally, the defendant must show that the

prosecution would not have withdrawn the offer, and the court would have accepted its terms. *Lafler*, 566 U.S. at 164; *Frye*, 566 U.S. at 147. However, informative statements by the court or government—for instance, the terms of a plea agreement itself—do not mitigate the prejudice of counsel's deficiency unless the defendant actually understood the issue at hand. *United States v. Crawford*, No. GJH-15-322, 2021 WL 1662471, at *9 (D. Md. Apr. 28, 2021).

A defendant can show that the prosecution and court would have followed through with the plea based on the "the boundaries of acceptable plea bargains and sentence" in the jurisdiction. *Fyre*, 566 U.S. at 149. "[I]n most instances, it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain." *Id.* For this reason, disputes over the prejudice prong usually hinge on whether the defendant would have otherwise accepted the plea. Evidence to this point includes a defendant's own testimony, his previous statements expressing an interest in pleading guilty, a history of accepting plea deals, a history of following his attorney's advice, and the general circumstances of the plea offer—for instance if it would have resulted in a far lower sentence. *See Cooper v. Lafler*, 376 F. App'x 563, 571-72 (6th Cir. 2010), vacated on other grounds, 556 U.S. 156 (2012); *Dodson*, 800 F. App'x at 180-81; *see also Swaby*, 955 F.3d at 243-44 (finding that defendant's strong familial ties to the United States indicated that he would have rejected a guilty plea that resulted in his deportation had he been properly advised).

A defendant's testimony can provide strong evidence of prejudice. In *Lafler*, the Supreme Court recognized that the defendant met the *Strickland* prejudiced prong based largely on the defendant's uncontradicted testimony that he would have taken the plea if not for his lawyer's incorrect advice about the possibility of a conviction at trial. 566 U.S. at 174. Additionally, his

lawyer confirmed he was open to a plea agreement, and the disparity between the rejected plea and his sentence exposure after trial further substantiated the defendant's testimony. *Id.* The government pointed to evidence that the defendant had wanted a plea deal with an even lesser sentence as indication that he would not have accepted the actual plea offer, but the court found that this actually corroborated his position by further indicating his desire to avoid a trial. *Id.* The court also rejected the government's argument that the defendant never expressed desire to plead guilty during pretrial conferences, concluding that this lack of interest stemmed from his counsel's incorrect advice. *Id.* Similarly, in *Dodson*, the defendant's testimony, history of accepting guilty pleas and generally relying on the advice of counsel, and the plea's objective benefits sufficed to establish prejudice. 800 F. App'x at 180-81. However, a defendant's testimony alone can be insufficient if his conduct does not suggest he would have accepted the plea. *See Merzbacher v. Shearin*, 706 F.3d 356, 366-67 (4th Cir. 2013) (finding that the state court was not unreasonable to conclude that the defendant's insistence on his innocence showed he would not have taken a guilty plea).

For CLIENT, his own testimony that he would have taken the plea but for counsel's advice provides substantial evidence of prejudice. This is corroborated by phone calls indicating that he was poised to take the plea until his attorney began reemphasizing the merits of going to trial. *See* Calls on 12/29/21, 2/11/21. Additionally, as in *Lafler* and *Dodson*, the disparity between the sentence offered in the plea—six years—and the sentence he now phases—ten years to life—substantiate this testimony; the fact that any rational person would have taken such a plea is itself evidence of prejudice. Further, like the defendant in *Dodson*, CLIENT has a history of following his counsel's advice. Upon deciding to reject the plea deal, he stated "I'm going into this completely on faith of my attorney." Call on 2/17/22. At counsel's suggestion, he hired a

series of public relations firms to publicize his case, part of counsel's misguided strategy to leverage the popularity of marijuana into a case dismissal or jury nullification. *See* Calls 5/12/21, 5/18/21. Moreover, this was against CLIENT's better judgement; he stated his frustration with "influencer" culture and worried it was a pointless tactic but changed his mind when counsel said it was best for his case—further indication of his deference to his counsel's advice. *See* Calls on 5/21/21, 5/24/21. Though CLIENT at times expressed antagonism to the idea of pleading guilty and cooperating with the government, this position is bound up with his attorney's near-daily statements that he would be heroic to go to trial and shine light on the injustice of marijuana criminalization. Like the defendant in *Lafner*, any disinterest CLIENT showed toward a plea deal was itself the result of counsel's deficiencies. In short, the evidence persuasively demonstrates that CLIENT would have accepted the plea but for his counsel's deficient performance.

The evidence also shows that the government would not have withdrawn the deal, and the court would have accepted it. CLIENT's many other co-defendants received similar plea offers, none of which were retracted by the government or rejected by the court. Further, the plea would have reasonably imposed a six-year sentence for a first-time, nonviolent drug offense. Due to CLIENT's safety-valve eligibility, this was well within the boundaries of acceptable plea agreements for such an offense. An objective assessment thus establishes that the government and court would have finalized the plea had CLIENT accepted it. This, together with the objective benefits of the plea deal, his history of following counsel's advice, and his corroborated testimony demonstrate that CLIENT was prejudiced by his counsel's deficient performance.

Rosemary Ardman
1300 Saint Paul St. #5, Baltimore, MD 21202
rardman@umaryland.edu | 512-815-6058

Writing Sample #2

The following writing sample is a portion of an internal memorandum written for a summer internship with the Federal Public Defender for the District of Maryland. Our client was the former CEO of a nonprofit utility provider. He allegedly participated in a kick-back scheme with a subcontractor and was charged with bribery and related offenses under 18 U.S.C. § 666. The following memorandum excerpt analyzes (1) whether the statute requires intent to engage in a quid pro quo and (2) whether the client is a "public official" for purposes of sentencing enhancement under the U.S. Sentencing Guidelines. All identifying information is redacted. The work is entirely my own without any editing from others.

Analysis

CLIENT allegedly violated 18 U.S.C. § 666, which applies when an agent of an organization that receives federal funding "corruptly solicits . . . or agrees to accept anything of value . . . intending to be influenced or rewarded in connection with any . . . transaction [worth at least $5,000]." 18 U.S.C. § 666(a)(1)(B). In punishing corrupt conduct, criminal law has historically distinguished between bribes and illegal gratuities, with the former a more serious offense that requires intent to enter a quid pro quo arrangement. Stephanie G. VanHorn, *Taming the Beast: Why Courts Should Not Interpret 18 U.S.C. § 666 to Criminalize Gratuities*, 119 Penn St. L. Rev. 301, 302 (2014). As the Fourth Circuit Court of Appeals explained in *United States v. Jennings*, bribery requires that the defendant acted with the "'corrupt intent' . . . to receive a specific benefit in return for payment"—in other words, "to engage in 'some more or less specific quid pro quo.'" 160 F.3d 1006, 1013 (4th Cir. 1998) (quoting *United States v. Duvall*, 846 F.2d 966, 972 (5th Cir. 1988)). An illegal gratuity, in contrast, "is a payment made to an official concerning a specific official act (or omission) that the payor expected to occur in any event"—more than "a good will gift" but less than a quid pro quo. *Id.* However, § 666 was enacted with broader language than the previous bribery statute, without an obvious distinction between bribes and illegal gratuities. *Id.* at 1019. Courts have divided on whether the quid pro quo requirement still applies, and the question is unresolved in the Fourth Circuit. *United States v. Vaughn*, 815 F. App'x 721, 728 (4th Cir. 2020).

I. Circuits are split on whether 18 U.S.C. § 666 criminalizes gratuities in addition to bribes, and the Fourth Circuit has not decided the issue.

Historically, illegal gratuities have been classified as a less serious offense than bribes due to the absence of a quid pro quo. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999). As the Supreme Court explained:

> [F]or bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take . . . or for a past act that he has already taken. The punishments prescribed for the two offenses reflect their relative seriousness.

Id. However, the language of § 666—"intending to be *influenced or rewarded*"—does not explicitly make this distinction. 18 U.S.C. § 666(a)(1)(b) (emphasis added); *see* 18 U.S.C. 201(b)-(c) (distinguishing between bribes given "to influence" an official act, and gratuities given "for or because of" an official act). As of today, the Second, Seventh, and Eighth Circuits have found that § 666 extends to illegal gratuities, with no quid pro quo requirement. *United States v. Bonito*, 57 F.3d 167, 171 (2d Cir. 1995); *United States v. Agostino*, 132 F.3d 1193, 1190 (7th Cir. 1997); *United States v. Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007). The First Circuit, in contrast, applies § 666 only to bribes. *United States v. Fernandez*, 722 F.3d 1, 6 (1st Cir. 2013). In *Jennings*, the Fourth Circuit expressed concern about eliminating the bribery/gratuity distinction, but it has so far avoided resolving the matter. 160 F.3d at 1015; *see Vaughn*, 815 F. App'x at 728 (discussing the status of the bribery/gratuity distinction in the Fourth Circuit).

a. Historically, an illegal gratuity given in the absence of a quid pro quo agreement was a less severe offense than bribery.

Prior to the enacting of § 666 in 1984, an illegal gratuity was considered a lesser included offense in bribery under 18 U.S.C. § 201, the general bribery statute. *Jennings*, 160 F.3d at 1012, 1014. This reflects the principle that the "corrupt intent" required for bribery "is a 'different and higher' degree of criminal intent than that necessary for an illegal gratuity," where the payment relates to conduct the recipient was expected to perform no matter what. *Id.* at 104 (quoting *United States v. Brewster*, 506 F.2d 62, 72 (D.C. Cir. 1974)). For this reason, § 201 expressly distinguishes between a bribe "corruptly" accepted "in return for . . . being influenced,"

punishable by up to fifteen years in prison, and a gratuity accepted "for or because of any official act," punishable by up to two years in prison. 18 U.S.C § 201(b)(2), (c)(3).

In contrast, § 666 applies when an individual "corruptly" accepts payment while "intending to be influenced *or rewarded*." *Id.* § 666(a)(1)(B) (emphasis added). In other words, § 666 adopts the corrupt intent element of the § 201 bribery provision but extends it to situations where the recipient was "rewarded" rather than "influenced," making the statute's application to gratuities unclear. To exacerbate this ambiguity, the original version of the statute, enacted in 1984, criminalized gifts made "for or because of the recipients conduct," an even broader category of intent. Pub. L. No. 98-473, § 1104(c), 98 Stat. 1837, 2144 (1984). In dicta, the Fourth Circuit suggested that the current statutory language could have been adopted to intentionally limit § 666 to bribes, though other courts have rejected this interpretation. *See Jennings*, 160 F.3d at 1016 n.4 ("[A] court interpreting the statutory history of the 1986 amendment to § 666 could reach the conclusion . . . that the 1986 amendment to § 666 clarified that the statute prohibited only bribes."). *But see Bonito*, 57 F.3d at 171 ("Fatal to [defendant's] argument [that the updated statute prohibits only bribes], however, is the fact that the deleted language has been replaced with language that is to the same effect.").

b. The Fourth Circuit has not decided whether § 666 requires intent to engage in a quid pro quo.

The Fourth Circuit has twice declined to rule on the application of § 666 but has suggested that a quid pro quo element should apply. *Jennings*, 160 F.3d at 105; *Vaughn*, 815 F. App'x at 728. In *Jennings*, the defendant, a contractor who made illegal payments to a housing authority contractor, argued that the payments were gratuities rather than bribes and not prohibited under the statute. 160 F.3d at 1010-12. The court ultimately found that the payments were bribes, so it did not address the interpretation of § 666. *Id.* at 1015. However, the court

suggested that including gratuities within the statute would problematically "blur longstanding distinction between bribes and illegal gratuities." *Id.* at 1015 n.4. In a long footnote, the court criticized other circuits' decision to extend § 666 to gratuities and offered two potential justifications for excluding them. *Id*. First, a court could reasonably determine that "corruptly . . . with intent to influence or reward" resembles § 201's bribery provision, not the gratuity provision. *Id.* "Second, a court interpreting the statutory history of the 1986 amendment to § 666 could reach the conclusion . . . that the 1986 amendment to § 666 clarified that the statute prohibits only bribes." *Id.* Because the issue was unnecessary for the case's resolution the court "le[ft] the definitive interpretation . . . for another day." *Id.*

Two decades later, in *Vaughn*, the Fourth Circuit again deferred the question. 815 F. App'x at 728. Vaughn was a Maryland State Delegate who helped pass legislation permitting Sunday liquor sales in exchange for payments from liquor store owners. *Id.* at 723-26. He argued that the payments were gratuities rather than bribes because he would have voted for the bills regardless. *Id.* at 729. However, evidence indicated that even if he would have voted for "*some kind* of [Sunday sales] legislation," the payments still influenced the specific policies he supported. *Id.* (alteration in original). Again, because the evidence supported a bribery conviction, the court did not decide the gratuities issue, though it observed that most circuits apply § 666 to gratuities, with only the First Circuit limiting it to bribes. *Id.* Unlike in *Jennings*, the court did discuss other circuits' reasoning at length, but it noted, "A third possibility is that § 666 criminalizes bribery along with something less than bribery, but greater than a gratuity as defined under § 201." *Id.* This arguably suggests the Fourth Circuit remains open to limiting § 666, though the reasoning here further blurs the line between bribes and gratuities.

c. Only the First Circuit has found that § 666 applies exclusively to bribes.

The First Circuit alone has determined that § 666 does not include gratuities. *Fernandez*, 722 F.3d at 6. In *Fernandez*, the trial court instructed the jury that conviction under § 666 required the government to prove the existence of a quid pro quo, but it also instructed that the offer could take place *after* the conduct being rewarded. *Id.* at 17-18. On appeal, the defendants argued that an offer of a reward made after the conduct is a gratuity, not a bribe, and therefore not covered by the statute. *Id.* at 18-19. The First Circuit agreed. First, it determined that bribery occurs only if the offer is made beforehand, though payment itself can occur after the conduct. *Id.* at 20. Second, the court found that § 666 applies only to bribes, a conclusion based on the statute's use of "corruptly," its relationship with § 201, and the historically disparate penalties for bribes and illegal gratuities. *Id.* at 20-26. While most circuits have held that a gratuity falls within the provision as a "reward," the court explained that "the word 'reward' does not create a separate gratuity offense in § 666, but rather . . . merely clarifies 'that a bribe can be promised before but paid after, the official's action on the payor's behalf." *Id.* at 23 (citing *Jennings*, 160 F.3d at 1015 n.3). *Fernandez*'s analysis is far more extensive than that of cases from other circuits and provides a strong persuasive precedent for limiting the statute to bribes.

d. The Second, Eighth, and arguably Seventh extend § 666 to illegal gratuities.

The Second, Seventh, and Eighth Circuits have rejected a quid pro quo requirement and found that § 666 criminalizes both bribes and illegal gratuities. In *United States v. Crozier*, the Second Circuit Court of Appeals pointed to the "broad language" of an earlier version of § 666, which criminalized the offer of "anything of value *for or because of the recipient's conduct*," to justify including "both past acts supporting a gratuity theory and future acts necessary for a bribery theory." 987 F.2d 893, 898-99 (2d Cir. 1993). *Bonito*, a Second Circuit case concerning the current version of § 666, echoed this reasoning in concluding that payment "to influence or

reward" official conduct covers gratuities given with the intent to reward, "so long as the intent to reward is corrupt." 57 F.3d at 171. Likewise, in *Zimmerman*, the Eighth Circuit Court of Appeals rejected the defendant's argument that conviction required a quid pro quo, reasoning that "intending to be influenced or rewarded" means that the law applies both to "bribes and the acceptance of gratuities intended to be a bonus for taking official action." 509 F.3d at 927.

The Seventh Circuit has also rejected a quid pro quo element, though its case law is somewhat ambiguous. In *Agostino*, the court found that the government did not need to show a quid pro quo agreement when charging an individual based on the *offer* of a payment. 132 F.3d at 1190. However, the earlier case *United States v. Medley* potentially recognized a quid pro quo element when an individual was charged with *receiving* an illegal payment. 913 F.2d 1248, 1260-61 (7th Cir. 1990). In considering an appeal based on erroneous jury instructions—ultimately rejected—the court stated, "The essential element of a § 666 violation is a 'quid pro quo'; that is, whether the payment was accepted to influence and reward an official for an improper act." *Id.* at 1260. Confusingly, though, the court also remarked that bribes and gratuities "are both illegal under different parts of the statute," seeming to distinguish between them based on something other than the quid pro quo element. *Id.* Considering this language, the *Agostino* court stated that *Medley* "was not positing an additional element to the statutory definition of the crime, but instead was explaining the *sine qua non* of a violation of § 666." 132 F.3d at 1190. Because of this, and the fact that *Medley* concerned receiving rather than giving a bribe, *Agostino* "decline[d] to import an additional, specific *quid pro quo* requirement into the elements of § 666(a)(2)." *Id.*

II. "Public official" includes individuals in positions of public trust with responsibility for carrying out government policies and programs.

The United States Sentencing Guidelines enhance the sentence of individuals convicted under 18 U.S.C. § 666 "if the defendant was a public official." U.S. SENT'G GUIDELINES MANUAL § 2C1.1(A). The Guidelines state that "public official" is to be broadly construed and includes "[a]n individual who . . . (i) is in a position of public trust with official responsibility for carrying out a government program or policy; (ii) acts under color of law or official right; or (iii) participates so substantially in government operations as to possess de facto authority to make governmental decisions." *Id.* § 2C1.1(A) cmt. n.1.

Given this intentionally broad construction of "public official," the above category likely applies to CLIENT. COMPANY, a 501(c)(12) nonprofit, was created by the Maryland General Assembly and is funded largely by the state and federal government, suggesting that CLIENT was "in a position of public trust with official responsibility for carrying out a government program or policy." *Id.* Further, courts have generally been unreceptive to defendants' assertions that they are not public officials, even in ambiguous circumstances. *See, e.g.*, *United States v. ReBrook*, 58 F.3d 961, 969-70 (4th Cir. 1995) (finding that the attorney for the West Virginia Lottery Commission was an "official holding a high level decision-making or sensitive position); *United States v. Hernandez*, No. 20-50012, 2021 WL 3579386 (9th Cir. Aug. 13, 2021) (finding that an employee of Fannie Mae, a private company under a government conservatorship, was a public official).

CLIENT could likely be a public official based exclusively on the Navy contract, though this is less clear, and no case law speaks directly to this issue. In *United States v. Dodd*, a guard at a private prison that housed federal inmates conceded that he was a "public official" but unsuccessfully disputed that he held a high-level decision-making position. 770 F.3d 306, 308 (4th Cir. 2014). Though a very different context, this arguably suggests that an employee of an

organization involved in the execution of a contract with the government can be a public official. Somewhat similarly, in *United States v. Robinson*, the defendant unsuccessfully appealed a conviction for fraudulently billing the Newark Watershed Conservation Development Corporation ("NWCDC") because NWCDC's status as a private organization negated the "public official" element of her charges. No. 21-1114, 2022 WL 186047, at *1 (3d Cir. Jan. 20, 2022). The court determined that NWCDC was effectively a public actor based on a New Jersey law that a non-profit in a contract with the city related to water supply "exercise[d] the powers and responsibilities of the city." *Id.* Maryland does not appear to have any analogous statutes for utility providers, but the government has a strong argument that the nature of contract between COMPANY and the Navy meant that CLIENT was "in a position of public trust with official responsibility for carrying out a government program or policy."

Applicant Details

First Name	**Isabelle**
Last Name	**Argueta**
Citizenship Status	**U. S. Citizen**
Email Address	**iargueta@uchicago.edu**
Address	**Address** Street **5000 S East End 24B** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**3105989273**

Applicant Education

BA/BS From	**University of California-Los Angeles**
Date of BA/BS	**June 2018**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Edward W. Hinton Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **No**
Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Miller, Judith
jpmiller@uchicago.edu
(773) 834-3114
Judge, Mary
mary_judge@fd.org
(312) 621-8336
Davidson, Adam
davidsona@uchicago.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Isabelle Argueta
5000 S East End #24B
Chicago, IL 60615
(310) 598-9273 | iargueta@uchicago.edu

June 12th, 2023

The Honorable Juan Ramon Sánchez
U.S. District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106
Courtroom 14-B

Dear Judge Sánchez:

I am a rising third-year law student at the University of Chicago Law School, and I am applying for a clerkship in your chambers for the 2024 term (I am also open to consideration for a 2025 term). As a Latina and an aspiring public defender, I was particularly drawn to the opportunity to learn from you and your particular experiences.

During law school, I have had the opportunity to be part of two teams defending clients in federal criminal court where I gained experience in motion writing and preparing memos for litigation. My 1L summer, I spent fifteen weeks as an intern with the Federal Defender Program. Among other duties, I assisted in a nearly five-week trial where I prepared memorandums for various evidentiary admissions and the jury instructions for the charging conference. During my 2L year, as a student attorney with the Federal Criminal Justice Clinic, I drafted pretrial motions for our client, including portions of a novel *Daubert* motion challenging a government neuropsychological expert based on cultural and linguistic incompetency, and I prepared the post-trial *Daubert* motion. I also again prepared the jury instructions and helped prep my professor, Judith Miller, for the charging conference.

My resume, writing sample, and transcript is enclosed. Letters of recommendation from Professors Judith Miller and Adam Davidson, and Assistant Federal Defender Mary Judge will arrive separately.

Sincerely,

/s/ Isabelle Argueta

Isabelle Argueta

Isabelle Argueta
(310) 598-9273 | iargueta@uchicago.edu

EDUCATION

The University of Chicago Law School | *J.D.* Expected June 2024
Activities: Latinx Law Students Association, Co-President; Winner of the 2L Public Service Award
Pro Bono: Prison Letter Writing Project; Criminal Record Expungement Clinic with Legal Aid Chicago
Research: Professor Adam Chilton on human rights

London School of Economics | *M.Sc., with high merit,* Political Theory December 2019
Dissertation: *A Theoretical Understanding of Identity* under the supervision of Professor Anne Phillips

University of California, Los Angeles |*B.A., magna cum laude,* Philosophy, minor in Civic Engagement June 2018
Honors: Departmental Honors (Philosophy); College Honors (College of Letters and Science)
Dissertations: *Exploration of the Morality and Conceptualization of Civic Engagement*; *The Morally Permissible Lie in Politics; International Law Under a Hobbes framework*

EXPERIENCE

Alaska Public Defender Agency| *Dillingham, AK* | Legal Intern Summer 2023
- Licensed student intern, will represent a predominately Native Alaskan clientele for misdemeanor matters in court

Federal Criminal Justice Clinic| *Chicago*, IL | Student Attorney Fall 2022 - Present
- Drafted and edited pretrial motions including portions of a novel Daubert challenge on the basis of linguistic and cultural incompetency in an intellectual assessment
- Prepped expert witness for a Daubert hearing and trial and a lay witness for trial; prepared the jury instructions and oral argument for the charging conference
- Conducted legal and social science research for excluding expert testimony of a neuropsychologist

Federal Defender Program Northern District of IL| *Chicago*, IL | Legal Intern Summer 2022
- Assisted with trial for co-defendant on high-profile five-week R. Kelly criminal trial, including preparing jury instructions, reviewing discovery, and conducting legal research on evidence admission
- Prepared seven separate motions of early termination of supervised release, including interviewing clients and preparing notes for the hearings
- Drafted memoranda of law on motions to strike in the criminal context and on Terry stops
- Participated in summer courses on the federal criminal justice system process and trial advocacy

Yours Humanly | *San Francisco, CA* | Grant Coordinator Summer 2020 - Fall 2021
- Worked independently, on small teams, and with the CEO, as a grant writer for small nonprofit focused on funding education resources to low-income students in multiple countries in Southeast Asia and the Bay area
- Created high quality proposals and reports, advocated on behalf of children in need, and communicated accomplishments to grant-makers and fundraisers

Morobe Development Foundation| *Lae, Papua New Guinea* | Grant-writing Volunteer Spring 2020
- Researched, drafted, and edited grant proposals for gender- and social justice-related projects at a community-based nonprofit working to improve quality of life, provide education, and boost civic engagement in Lae

Congresswoman Linda Sánchez (CA-38)| *Washington, D.C.* | Congressional Intern Fall 2017
- Acted as the first point of contact for those interacting with her office and assisted with constituent correspondence; received, logged, and responded to constituent concerns; handled phone calls, greeted and tended to important visitors; and guided visiting constituents through the Capitol building and congressional offices

ADDITIONAL INFORMATION

Interests: Hiking; travel (including the U.S., Central America, Ukraine, Egypt, and Western Europe); yoga; plant-based cooking
Language Skills: Spanish (conversational)

THE UNIVERSITY OF CHICAGO

Name: Isabelle Argueta
Student ID: 12334886

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

University of California, Los Angeles
Los Angeles, California
Bachelor of Arts 2018

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Lior Strahilevitz	3	3	177
LAWS	30211	Civil Procedure Emily Buss	4	4	177
LAWS	30611	Torts Saul Levmore	4	4	176
LAWS	30711	Legal Research and Writing Michael Morse	1	1	179

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Sonja Starr	4	4	176
LAWS	30411	Property Lee Fennell	4	4	175
LAWS	30511	Contracts Eric Posner	4	4	173
LAWS	30711	Legal Research and Writing Michael Morse	1	1	179

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Michael Morse	2	2	178
LAWS	30713	Transactional Lawyering Douglas Baird	3	3	177
LAWS	43220	Critical Race Studies William Hubbard	3	3	180
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	177
LAWS	47201	Criminal Procedure I: The Investigative Process John Rappaport	3	3	177

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	46101	Administrative Law Thomas Ginsburg	3	3	175
LAWS	46501	Federal Criminal Law Sharon Fairley	3	3	177
LAWS	53219	Counterintelligence and Covert Action - Legal and Policy Issues Stephen Cowen Tony Garcia	3	3	178
LAWS	90221	Federal Criminal Justice Clinic Erica Zunkel Alison Siegler Judith Miller	2	0	
LAWS	95030	Moot Court Boot Camp James Whitehead Stephen Patton	2	2	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Geoffrey Stone	3	3	177
LAWS	48214	Race and the Law Adam Davidson	3	3	182
LAWS	53256	Advanced Topics in Moral, Political, and Legal Philosophy:Marx's Phil. and Its 20th-Century Dev. Brian Leiter Michael N Forster	3	0	
LAWS	90221	Federal Criminal Justice Clinic Erica Zunkel Alison Siegler Judith Miller	2	0	

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence John Rappaport	3	3	180
LAWS	47301	Criminal Procedure II: From Bail to Jail Alison Siegler	3	3	176
LAWS	53101	Legal Profession: Ethics Hal Morris	3	3	179
LAWS	90221	Federal Criminal Justice Clinic Erica Zunkel Alison Siegler Judith Miller	2	0	

End of University of Chicago Law School

Date Issued: 06/02/2023


THE UNIVERSITY OF
CHICAGO

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Recommendation for Isabelle Argueta

Dear Judge Sanchez:

I write to enthusiastically recommend Isabelle Argueta for a clerkship in your chambers. I worked closely with Isabelle preparing for a major federal drug trafficking trial, during which she made major and innovative contributions. Isabelle's every decision reflected a seriousness of purpose and commitment to public interest, especially to becoming a public defender. She will be an asset to any chambers.

I had the pleasure of working with Isabelle during the 2022–23 academic year in my highly competitive Federal Criminal Justice Clinic. The Federal Criminal Justice Clinic is the first legal clinic in the country to focus on representing indigent clients charged with federal felonies. Student-attorneys such as Isabelle meet weekly in teams with their faculty supervisors, write the first draft of everything we submit, edit and respond to comments in ten or more drafts, and shape the strategy for our projects.

Isabelle stood out for her ability to grasp new issues, integrate them into legal filings, see the big picture, and to operationalize all of that even in the fast-paced and demanding environment of a federal jury trial. Isabelle's contributions to the trial case were all the more remarkable in light of the pandemic: the only projects left for her to take on were especially challenging as two prior years of clinic students had already worked up the case.

Isabelle was instrumental in preparing a centerpiece of our trial defense. We argued that our client's low IQ prevented him from forming the specific intent needed to commit the offense, and he therefore was not guilty. Isabelle quickly and successfully became our team's internal substantive expert on the issue despite her lack of any prior experience in the area: She researched the scholarly and professional neuropsychological literature, taught the rest of the trial team (myself included) the terms of the intra-neurospychological debates, sifted the wheat from the chaff, and ultimately helped draft a complex Daubert motion to allow our expert and exclude the government's expert. Isabelle's strong research skills show her ability to dive into a new area, figure it out, and then use it to launch legal arguments.

Isabelle's time-sensitive work on our post-hearing Daubert motion also demonstrates how her research and writing, insight, and preparation can help keep a project on track—qualities that will serve her well in a clerkship. Before the Daubert hearing at which our expert and the government expert testified, Isabelle drafted a post-hearing brief to allow our expert and exclude the other side's expert. She figured out the key issues, drilled into the experts' likely testimony, integrated their anticipated testimony into our arguments, and so on—all of which enabled the defense team to meet the court's tight one-week deadline for the post-hearing brief. Her careful preparation, research, writing, and reasoning paid off: The court ultimately agreed with our reading of the evidence and case law and allowed our expert to testify.

Isabelle's work on jury instructions likewise reflects her ability to grasp the details and the big picture at the same time, make persuasive arguments, and to successfully turn around a project on a tight deadline. Isabelle organized our preparation for the jury instruction conference almost entirely independently. We had submitted our proposed instructions over a year earlier, well before she joined the team. She nonetheless quickly mastered the entire body of written work: our proposed instructions, the government's instructions, and the agreed pattern instructions. Based on that mastery, her big picture understanding of the case, and her fine-grained understanding of the evidence, she made key recommendations about which instructions to fight for, which to just lay a record for, and which to let go. Most importantly, she also found a new and favorable instruction both parties had missed. Her work ultimately persuaded the court and the government that the new instruction was warranted. Again, this ability to put together the details and the big picture on a tight schedule will make her a gift to any chambers.

Beyond her intellectual ability, Isabelle is also deeply committed to a career in public interest, especially public defense. She wants nothing more than to be an Assistant Federal Defender. She speaks movingly about how much it means to know that someone is on your side, and the ways in which small changes can make an enormous difference in someone's life—just as they did in her own trajectory from an at-risk high school student to the present.

Isabelle's extraordinary extracurricular accomplishments during law school show that her commitments are more than just words. She won the 2L public service award, and, as co-President of the Latinx Law Students Association, she led the organization to also win the Student Organization Pro Bono Award. Impressively, she created a pro bono project where law students teach constitutional law to eighth graders at a predominantly Latinx school; she also brought more and a wider variety of public interest attorneys into organization's lunch talk speaker series, e.g., lawyers who work on labor rights for farm workers, reproductive justice in the Americas, and similar projects. My clinic is extraordinarily time-consuming, especially for a student working on a trial case. For Isabelle to have received two public interest awards at the same time only underscores her commitment to the work, and her ability to carry it out.

At a personal level, Isabelle is also a pleasure to work with and a deeply responsible person. Her seriousness of purpose is reflected in everything she does, from the most sophisticated legal work to basic human assistance. I turned to her—and only her

Judith Miller - jpmiller@uchicago.edu - (773) 834-3114

—when I learned that the City of Chicago was relying entirely on local networks of volunteers to provide bedding and blankets for asylees bussed to Chicago from Texas. Despite the fact that our trial was over and finals were about to begin, Isabelle immediately understood the time-sensitive nature of the crisis and quickly pulled together an effective plan for collecting blankets for the new migrants. I was shocked to walk into the law school one day and find an entire room filled with blankets, sleeping bags, tents, and the like. Though the issue was not legal, it nonetheless emblematizes one of Isabelle's key qualities: She is the person to rely on when the stakes are real and time is short.

For all these reasons, I have no doubt that Isabelle will be an asset to your chambers. Please do not hesitate to reach out with any questions or concerns. I would be happy to tell you more about Isabelle, at your convenience.

Sincerely,

/s/ Judith P. Miller

Judith P. Miller
Clinical Professor of Law, Federal Criminal Justice Clinic

FEDERAL DEFENDER PROGRAM

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

55 E. MONROE STREET - SUITE 2800
CHICAGO, ILLINOIS 60603

PHONE 312.621.8300
FAX 312.621.8399

JOHN F. MURPHY
EXECUTIVE DIRECTOR

CHRISTINA L. FARLEY JACKSON
DEPUTY DIRECTOR

ROBERT D. SEEDER
CHIEF TRIAL ATTORNEY

MICHAEL T. WYSOPAL
ADMINISTRATIVE OFFICER

TERENCE F. MacCARTHY
CAROL A. BROOK
DEFENDER EMERITI

SEEMA AHMAD
ANJALI BIALA
PIYUSH CHANDRA
IMANI CHIPHE
JACK CORFMAN
ERIN K. DEGRAND
WILLIAM HARDWICKE
DANIEL J. HESLER
EMILY HOSSEINI
JASMINE J. JOHNSON
MARY H. JUDGE
KATHLEEN LEON
DANIEL P. McLAUGHLIN
GEOFFREY M. MEYER
AMANDA PENABAD
MIKIKO THELWELL
AKANE TSURUTA

June 12, 2023

Honorable Juan Sanchez
District Court Judge

Dear Judge Sanchez,

I write to highly recommend Isabelle Argueta for the clerkship position and to support her application without reservation.

After completing her first year of law school at the University of Chicago, Isabelle was a legal intern for the Federal Defender Program during the summer of 2022. A legal intern works closely with their assigned attorney and is given substantial responsibility to support our work and our clients. We have a diverse caseload, and our interns help us to fight for our clients in ways that our own duties do not always allow, by exploring issues with greater breadth or depth.

Isabelle immediately stood out as an exceptionally thoughtful, hard-working, and dedicated intern. She is a talented legal researcher and writer, coming up with ideas and arguments that are both persuasive and thorough. Isabelle is detail-oriented, recognizing important aspects of law and fact. For these reasons, Isabelle was invited to assist in a long, high-profile trial that took place during the summer of her internship. My client was a co-defendant in the *United States v. R. Kelly* case, and although Isabelle was not assigned to me, she was brought into the trial because of her enthusiasm, willingness, calm demeanor, and ability to work well in a team environment.

Isabelle extended her (unpaid) internship to stay with the Federal Defender Program until the five-week trial was over. She attended the trial every day and took detailed notes of every one of the nearly 30 government witnesses. Her notes and insights were used in preparing the closing argument and were instrumental in ensuring that all important aspects of the testimony were

included. Every day after trial the team met and Isabelle willingly participated in the recap, and volunteered for or willingly accepted assignments to be completed before the trial started the following morning. This included research on evidentiary issues, preparing motions, drafting proposed jury instructions, and providing feedback for direct and cross-examinations, and opening and closing arguments. These tasks often required careful review of the daily transcripts from the trial, and from a previous trial held against R. Kelly, in New York. The amount of work was incredible and Isabelle tirelessly produced exceptional results in this high-stress environment.

In addition to her legal skills, Isabelle is compassionate, positive and a pleasure to work with. Despite the amount of work or its time-sensitive nature, Isabelle brought delightful and positive energy with her every day. I cannot recommend Isabelle highly enough. I am certain her passion and dedication will immediately become apparent to you, as it was to me. If you have any questions, please reach out at any time. My direct line is 312.621.8336 and email address is mary_judge@fd.org.

Sincerely,

/s/ Mary H. Judge
MARY H. JUDGE
FEDERAL DEFENDER PROGRAM
55 E. Monroe, Suite 2800
Chicago, IL 60603
(312) 621-8300

Adam Davidson
Assistant Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
davidsona@uchicago.edu | 773-834-1473

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is my pleasure to recommend Isabelle Argueta for a clerkship in your chambers. I met Isabelle when she took my Race and the Law class, and she consistently proved herself to be one of my strongest students. Indeed, the 182 she received was one of the top few grades in the class. And that grade was no surprise, the conversations I had with her both in and outside of class illuminated just how thoughtful she is about the issues we were studying.

I cannot speak to Isabelle's other grades—they are good, but admittedly not at the top of the class—but I can say why her grade in my class might be particularly suggestive of her future ability as a law clerk. I teach Race and the Law as a survey course. We cover everything from pre-Civil War cases on how race was defined in the context of slavery to affirmative action to modern employment law cases alleging racial discrimination in the workplace. While the theme of the course is exploring how race shapes the law and vice versa, I require my students to master the black letter law of the various subjects in addition to the historical and theoretical undercurrents that we often discuss in class. The pace, complexity, and overall difficulty of the course led me to decide to limit it only to second and third-year law students, even though the university has a brand new Department of Race, Diaspora, and Indigeneity with which I might have cross-listed it.

Though I did not mean to do this when I designed the course, I have since realized that the skills necessary to succeed within it are exactly those that a good law clerk must possess. (Unsurprisingly, several of the other top students in the class are 3Ls whom I know will be clerking after graduation.) Isabelle, as you might expect, has these in spades. She deftly moved between areas of law both in our class discussions and on her exam. She showed a firm grasp on the black letter law, as well as the theory and history underlying it, her writing was crisp and clear, and she demonstrated a deep understanding of not only the arguments with which she agrees, but of her opponent's as well.

This last point bears special attention. One of my exam questions was to write an opinion on affirmative action in the voice of a selected jurist or scholar. Though I gave students options from across both time and the political spectrum, in a very left-leaning class, I anticipated that most students would pick Thurgood Marshall, or perhaps Derrick Bell. So I was pleasantly surprised when a number of students chose to write as Clarence Thomas. Isabelle not only made this choice, but her mock opinion consistently captured the depth and complexity of Thomas's objections in a way that hardly any other student managed. Indeed, the connections she drew between the harms of singling out a race for affirmative action and the history of our immigration laws was so compelling I'm surprised Thomas hasn't made the argument more forcefully himself.

But beyond her academic performance, Isabelle is simply a wonderful person, both generally, and with whom to sit down and have a conversation. She has come to my office several times to discuss issues of racial identity that were raised in class, and which she studied and wrote about for her masters' degree in political theory. She most recently approached me to discuss doing an independent research project next year exploring questions of how racial identity is created that we discussed in class. And she is truly dedicated both to making the Law School and the world a better place. She was the co-president of LLSA, with whom she started a quarterly pro bono project wherein law students taught constitutional law to eighth graders at a predominantly Latinx school and helped to organize a criminal expungement clinic alongside Legal Aid Chicago and Latham & Watkins. Additionally, she helped to organize numerous talks by people working in the public interest at the school. These included both lawyers, including those who work on labor rights issues for farm workers and argue affirmative action cases to the Supreme Court, and non-lawyers, like a group of nonviolence activists and organizers working on the south and west sides of Chicago. Perhaps unsurprisingly as a result of this work, LLSA won the Student Organization Pro Bono Award, and she won the school's 2L Public Service Award. Professionally, she is dedicated to becoming a federal public defender. To that end, she worked with the federal defender in Chicago for 15 weeks during her 1L summer, and she is now a member of the school's Federal Criminal Justice Clinic. In both, she has been part of trial teams. And separate from her school and professional affiliations, she has organized a blanket drive for the migrants who, as a result of being sent to Chicago from other states, are in dire need of basic necessities.

That she has done all of this from relatively humble beginnings simply makes her all the more impressive. She has worked her way from what she describes as a "really bad" high school in Indianapolis, from which most of her friends failed to graduate, to community college in California, to UCLA, to the London School of Economics, and now to the University of Chicago.

Isabelle is unquestionably an impressive person. But even more than she is impressive, she is good. My experience with Isabelle is that she is an excellent student and an even better person. I strongly recommend her for a clerkship in your chambers.

Sincerely,

Adam Davidson

Isabelle Argueta

(310) 598-9273| iargueta@uchicago.edu

Writing Sample

I prepared the attached writing sample for my Legal Research & Writing class at the University of Chicago Law School. In this memorandum, I was tasked with evaluating whether a fictional plaintiff could sue a corporation under the Illinois Right of Publicity Act for putting up billboards with his likeness on them. This assignment provided the cases and restricted outside research.

QUESTION PRESENTED

Roy Kent is a recently retired Bears football player with the social media handles @MrIDontCare. Mariano's, a Chicago-area grocery chain, recently put up several billboards with its logo, a photo of a football player in Bears' colors, and the words "Congratulations on a great career, Mr. I Don't Care!" Do Mariano's billboards violate the Illinois Right of Publicity Act?

BRIEF ANSWER

Mariano's billboards likely do not violate the Illinois Right of Publicity Act (IRPA). In Illinois, "[a] person may not use an individual's identity for commercial purposes during the individual's lifetime without having obtained previous written consent from the appropriate person..." 765 Ill. Comp. Stat. 1075/30(a) (2021). To prove a violation under the Act, a plaintiff must establish three elements: (1) non-consent, (2) an appropriation of identity, and (3) for a commercial purpose. *Dancel v. Groupon*, 949 F.3d 999, 1008 (7th Cir. 2019).

In the present case, while the first two elements are established, the final element is likely not. It is clear that Roy Kent did not consent in putting up these billboards. Kent is also likely identifiable to a reasonable person based on the billboards' imagery and text. However, the billboards are probably not serving a commercial purpose. Mariano's billboards are an act of brand awareness. While courts have not yet ruled on whether brand awareness qualifies as a commercial purpose, the legislative intent of IRPA suggests that brand awareness likely does not qualify. Thus, Mariano's billboards likely do not satisfy the third element for violating the Act.

FACTS

Roy Kent is a former Chicago Bears quarterback. A week after his retirement announcement, the Chicago-area grocery chain Mariano's put up several billboards around the city with a picture of a football player facing away from the camera. That player was wearing a generic football jersey in Bears colors with no name or number on the back of the jersey. On each billboard there was a Mariano's logo next to the text, "Congratulations on a great career, Mr. I Don't Care!" Kent's social media handles are @MrIDontCare— a reference to his infamous public incident of yelling "I don't care!" at a fan attempting to compliment him. Kent has had these social media handles since the incident six years ago. Kent has never given Mariano's permission to use his image, likeness, or any other identifiers.

ANALYSIS

The Illinois Right of Publicity Act states in part that "[a] person may not use an individual's identity for commercial purposes during the individual's lifetime without having obtained previous written consent from the appropriate person...." 765 Ill. Comp. Stat. § 1075/30(a). To bring a successful claim under this Act, a plaintiff must establish three elements: (1) non-consent, (2) appropriation of identity, and (3) commercial purpose. *Dancel*, 949 F.3d at 1008. In this case, the element of consent is not disputed. It is clearly established that Kent has never given permission to Mariano's. The following analysis will discuss whether Kent can establish the elements of identity appropriation and commercial purpose.

1. Kent was probably identifiable to a reasonable person.

The combination of the photograph and the username on the billboards strongly suggest that Mariano's billboards identify Roy Kent. "Identity" in the IRPA means "any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener"

and includes, but is not limited to, "(i) *name*, (ii) signature, (iii) *photograph*, (iv) image, (v) likeness, or (vi) voice." 765 Ill. Comp. Stat. § 1075/5 (emphasis added). For purposes of establishing identity here, two issues will be addressed: (1) how a photograph (such as the photograph on Mariano's billboard) can establish identity and (2) how a username can establish identity. The combination of the two attributes indicates that the billboards identify Roy Kent.

"An individual's photograph, like her name, is expressly protected by the IRPA," but that protection extends only so far as that photograph "serves to identify *that* individual to an ordinary, reasonable viewer." *Dancel*, 949 F.3d at 929. In *Marchman v. Kovel- Fuller LLC*, the court framed the issue as whether there are any "distinctive features" that would identify the individual to an "ordinary, reasonable viewer." *Marchman v. Kovel-Fuller*, LLC, No. 06 C 1130, 2007 WL 9811116, at *2 (N.D. Ill. July 9, 2007). Thus, for a photograph to be identifying under IRPA, the photograph must show features that would assist an "ordinary, reasonable viewer" in identifying the individual in question.

Similarly, a username (or social media handle)[1] identifies an individual when an "ordinary, reasonable viewer would … have evidence of which username, which account, and which person it was linking" *Dancel*, 949 F.3d at 1009. However, any random username cannot by itself be identifying under IRPA. In other words, simply having a username connected to a profile one uses is insufficient. For usernames specifically, the IRPA does demand additional evidence: "an attribute, even a name, serve to identify an individual... the one whose identity is being appropriated." *Id.* This is "a comparative exercise that depends on both the specific individual and the specific appropriated attribute in question." *Id.* Thus, while usernames are not identifying per se, additional attributes can support finding them identifying. Indeed, the analysis

[1] In *Dancel*, the username in question was specifically from Instagram, however this can be reasonably extended to apply to other social media handles.

thus leaves open that, for certain individuals with highly prominent social media handles, these usernames alone may in fact be identifying (e.g., in the case of famous or noteworthy social media profiles).

Turning to the facts of this case, the two attributes of the photograph and username strongly support that the billboards identify Roy Kent. First, the photograph is very likely identifiable as Roy Kent. It is a picture of a football player in Bears colors. The billboard was posted a week after Kent's retirement, and congratulated the figure on a "great career," suggesting that the billboard was a response to a retiring person who plays football and wears Bears colors. While the lack of a name or number on the jersey may suggest that this photo cannot be linked to Roy Kent, the wording of the text beside the figure supports the inference that the figure cannot be another player. Roy Kent is likely the only Bears quarterback who has very recently retired. Even more suggestive is the billboard's reference to the figure as "Mr. I Don't Care"—a reference to Kent's nickname of over six years. This nickname itself is a reference to his most infamous off-field incident—yelling at a fan "I don't care!"

"Mr. I Don't Care" likely also identifies Roy Kent's username. Kent's social media username of @MrIDontCare, has the requisite additional attributes to support finding them identifying. Again, the username itself is a reference to his most famous off-field incident and is used as a nickname for Kent on and off the field. Furthermore, Kent is a public figure, who has recently returned to glory in the football world. The likelihood that this nickname—'Mr. I Don't Care'—identifies [or "is identifying to"] him, rather than a layperson, is significantly more likely. An ordinary, reasonable person, especially one residing in Chicago, where the billboard is located, could see that "Mr. I Don't Care" likely refers to Kent on social media.

2. The billboards by Mariano's were probably not for a commercial purpose.

Based on the applicable case law of commercial purpose, Mariano's billboards likely do not qualify. "Commercial purpose" under the IRPA means "the public use or holding out of an individual's identity (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (ii) for purposes of advertising or promoting products, merchandise, goods, or services; or (iii) for the purpose of fundraising." Ill. Comp. Stat. § 1075/5. *Trannel v. Prairie Ridge Media, Inc.* determined whether material serves a "commercial purpose" with a two-part test. First, the material must be an example of public use. *Trannel v. Prairie Ridge Media, Inc.*, 987 N.E.2d 923 (Ill. App. Ct. 2013). "Public" here is unambiguous and means the "aggregate of the citizens", "everybody", the "people at large", or the "community at large." *Trannel*, 987 N.E.2d at 929. For example, in *Trannel*, a print advertisement was not public use because the ad was distributed to a significantly smaller population of people relative to the size of the population in the county. *Id.* Second, the material must be offered in connection with a good, sale, advertising, or fundraising. *Id.*

Mariano's billboards satisfy the first part of the test but fail the second. The billboards are a "public use" because they are by definition marketed to the people at large." *Id.* The billboards were displayed so that anybody in the city who walked by could view—a clear example of the "people at large" having access. However, the billboards were likely not offered in connection with a good, sale, or fundraising. There is no explicit sale or good promoted on the billboards. Nor is there a facially obvious example of fundraising on the billboards.

It is unclear whether a court will determine that a billboard not explicitly promoting goods, sales, or services qualifies as commercial purpose. A billboard with a commercial logo but no explicit promotion may be an example of "brand awareness" but it is unclear whether brand awareness counts as commercial purpose under the IRPA. While there is no specific

definition available, brand awareness seems to be an example of generally promoting a company or organization. The most relevant case on this issue, *Jordan v. Jewel Food Stores, Inc.*, concluded it was brand awareness when Jewel ran a page in a national magazine congratulating Michael Jordan on his induction into the Hall of Fame containing the Jewel logo but without explicitly promoting any goods or sales. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014). Like in *Jordan*, Mariano's billboards do not explicitly promote any goods sold or sales by Mariano's but are a case of "brand awareness." *Id.* at 518.

Jordan failed to make a definitive conclusion on whether brand awareness then qualifies as commercial purpose under IRPA. However, prior court analysis of legislative intent of IRPA suggests brand awareness does not qualify. "[T]he legislature's intended meaning of 'commercial purpose' was to prohibit transactions where an individual was using another's likeness or identity to make money, or to prohibit items bearing an individual's image from being sold to people." *Abbs v. Lily's Talent Agency*, No. 1–10–3726, 2012 WL6953496 (Ill. App. Ct. 2012). Without an aim of making money or selling a good, brand awareness alone cannot be found to be a commercial purpose. This seems to be the case regardless of format (e.g., if conducted through an avenue traditionally commercial in nature, such as magazine ads and billboards).

It is unlikely that the brand awareness from Mariano's billboards fulfil the IRPA's element of "commercial purpose." While a case of brand awareness, there is no additional information supporting finding that the billboards were conducted for the purpose of making money. Nor were the billboards selling any items. The billboards simply congratulated Kent on his retirement. While the billboards do contain the Mariano's logo, that simply supports a finding they are for brand awareness. With no further evidence that the billboards meant to make Mariano's money, a court is unlikely to rule that the billboards were for a commercial purpose.

CONCLUSION

In this case, a court would likely find that the billboards do not violate the Illinois Right of Publicity Act. While the billboards likely fulfill the elements of non-consent and an appropriation of identity, it is unlikely that a court will find that the billboard was put up for a commercial purpose.

Applicant Details

First Name	**Lizamaria**
Last Name	**Arias**
Citizenship Status	**U. S. Citizen**
Email Address	**la2866@columbia.edu**
Address	**Address** **Street** **100 La Salle St.** **City** **NYC** **State/Territory** **New York** **Zip** **10027** **Country** **United States**
Contact Phone Number	**3019571973**

Applicant Education

BA/BS From	**Wellesley College**
Date of BA/BS	**May 2017**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The Columbia Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**LaLSA Asylum and Refugee Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Garro, Alejandro
garro@law.columbia.edu
212-854-2692

Bulman-Pozen, Jessica
jbulma@law.columbia.edu
212-854-1028

This applicant has certified that all data entered in this profile and any application documents are true and correct.

100 La Salle St. Unit MG
New York, New York 10027
la2866@columbia.edu
(301) 957-1973

June 12, 2023

The Honorable Juan R. Sanchez
United States District Court, Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez,

I am a rising third-year student, Harlan Fiske Stone Scholar, and Senior Editor on the *Columbia Law Review*, seeking a clerkship in your chambers for the 2024–25 term or any term thereafter. I would bring four years of prior professional experience to your chambers.

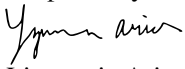
My interest in clerkships, and the law more broadly, stems from a firmly rooted conviction: of those to whom much is given, much will be expected. I did not grow up in a community with easy access to the judicial system or that had any familiarity with the corridors of power. I spent the last decade figuring out what path would allow me to harness my most beloved interests—reading voraciously and writing prolifically—in a way that would best position me to serve communities like my own. Over the past decade, I have had the privilege of working in a number of legal environments: private sector, nonprofit, clinic, and even a tiny four-person, asylum-focused firm. Through these experiences, I not only discovered that my penchant for reading and writing translates neatly into my chosen profession, but I also reaffirmed my perception of the law as a powerful tool and conduit to a more just society.

Having multiple years of work experience before law school, I am accustomed to working in fast-paced environments, getting up to speed on new material quickly, and prioritizing competing deadlines. With this professional experience, however, also comes the understanding that what often defines an excellent colleague are the intangibles. As such, what I believe will make me a strong clerk and value-add to your chambers is my inclination to lead with kindness in my daily interactions, my ability to remain calm and courteous amidst challenging circumstances, and my practice of treating everyone I encounter with dignity and respect. If given the opportunity to work in your chambers, I would bring an unparalleled work ethic, unflagging enthusiasm, and deep curiosity to every element of the work.

I have enclosed my application materials, including my resume, law school transcript, and writing sample. Also enclosed are letters of recommendation from Columbia Law School professors Jessica Bulman-Pozen (jbulma@law.columbia.edu; 212-854-1028) and Alejandro Garro (garro@law.columbia.edu; 212-854-2692).

Please do not hesitate to contact me if you require additional information. Thank you for your time and consideration.

Respectfully,



Lizamaria Arias

LIZAMARIA (LIZA) ARIAS
100 La Salle St., Unit MG, New York, NY 10027
la2866@columbia.edu • (301) 957-1973

EDUCATION

COLUMBIA LAW SCHOOL, New York, NY
J.D. expected May 2024
Honors: Harlan Fiske Stone Scholar
Activities: *Columbia Law Review*, Senior Editor; Diversity, Equity, and Inclusion Chair
LaLSA Asylum and Refugee Moot Court, 2L Editor
Veterans Rights Externship

WELLESLEY COLLEGE, Wellesley, MA
B.A. in Political Science-International Relations, *with honors*, received May 2017
Honors Thesis: "Playing by the Rules: An Assessment of Combat Atrocity During Operation Iraqi Freedom"

EXPERIENCE

WILLIAMS & CONNOLLY LLP, Washington, DC
Summer Associate May 2023 – August 2023
Researched and helped draft and edit memoranda on invasion of privacy and first amendment issues at various stages of civil litigation.

WHITE & CASE LLP, Washington, DC
Summer Associate May 2022 – July 2022
SEO Law Fellow May 2021 – July 2021
Wrote memoranda on commercial litigation matters, assisted with antitrust research, performed document review, drafted interrogatory responses for ANDA litigation, and worked on asylum pro bono litigation.

STERNE, KESSLER, GOLDSTEIN & FOX P.L.L.C., Washington, DC
Intellectual Property Assistant September 2019 – May 2021
Supported partners and associates with patent litigation in federal and district court. Edited briefs and conducted legal research. Filed court documents, maintained case deadline database, and assisted with document production.

BREAKING CYCLE PROJECT, Washington, DC
Founder June 2014 – April 2020
Founded program and authored blog to support first-generation students applying to college. Worked with local schools and nonprofits to give presentations and lead workshops on college accessibility.

CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (CSIS), Washington, DC
Project on Nuclear Issues, Herbert Scoville Jr. Peace Fellow September 2018 – May 2019
Awarded highly selective, national fellowship to work on nuclear security issues at a defense think tank. Carried out cutting-edge research examining the impact of emerging technology on nuclear strategic stability. As part of research, ran wargame exercises with senior government officials aimed at improving crisis decision-making.

FULBRIGHT FELLOWSHIP, Kaohsiung, Taiwan
English Teaching Assistant August 2017 – July 2018
Taught 20 English language classes per week to over 500 elementary school students. Worked closely with local instructors to develop culturally relevant and engaging language instruction materials.

PUBLICATIONS
Alice Friend and Lizamaria Arias, *Material and Discursive Sources of Militarization in Response to Transnational Terrorism* in MOBILIZING FORCE: LINKING SECURITY THREATS, MILITARIZATION, AND DEMOCRATIC CIVILIAN CONTROL. (D. Kuehn and Y. Levy, eds., 2021).

LANGUAGE SKILLS: Spanish (fluent), Mandarin Chinese (conversational)
INTERESTS: Brazilian jiu jitsu, biographies, road trips to historic inns

Columbia Law School

Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

06/07/2023 10:43:05

Program: Juris Doctor

Lizamaria Arias

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6614-1	Ex. Veteran's Rights	Foley, Ryan	2.0	A
L6614-2	Ex. Veteran's Rights - Fieldwork	Foley, Ryan	2.0	CR
L6256-1	Federal Income Taxation	Raskolnikov, Alex	4.0	B
L6781-1	Moot Court Student Editor II	Bernhardt, Sophia	2.0	CR
L6274-1	Professional Responsibility	Meyer, Janis	2.0	A
L8127-1	S. International Arbitration in Latin America	Garro, Alejandro	2.0	A-
L6822-1	Teaching Fellows	Bernhardt, Sophia	1.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6169-1	Legislation and Regulation	Bulman-Pozen, Jessica	4.0	B+
L6675-1	Major Writing Credit	Pozen, David	0.0	CR
L6681-1	Moot Court Student Editor I	Bernhardt, Sophia	0.0	CR
L8253-1	S. Congressional Oversight - Past, Present, & Future	Lowell, Abbe D.	2.0	A-
L6695-1	Supervised JD Experiential Study	Waxman, Matthew C.	2.0	A
L6683-1	Supervised Research Paper	Pozen, David	2.0	A
L6674-2	Workshop in Briefcraft [Minor Writing Credit - Earned]	Bernhardt, Sophia	2.0	CR

Total Registered Points: 12.0

Total Earned Points: 12.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	B
L6862-1	Lalsa Moot Court	Rodriguez, Alberto	0.0	CR
L6121-35	Legal Practice Workshop II	Rodriguez, Alberto	1.0	P
L6116-4	Property	Merrill, Thomas W.	4.0	B+
L6183-1	The United States and the International Legal System	Waxman, Matthew C.	3.0	A
L6118-2	Torts	Rapaczynski, Andrzej	4.0	B

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-7	Legal Methods II: Contemporary Issues in Constitutional Law	Liu, Goodwin	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Genty, Philip M.	4.0	B+
L6133-3	Constitutional Law	Bulman-Pozen, Jessica	4.0	B+
L6105-4	Contracts	Emens, Elizabeth F.	4.0	B
L6113-2	Legal Methods	Briffault, Richard	1.0	CR
L6115-11	Legal Practice Workshop I	Harwood, Christopher B; Hong, Eunice	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 58.0

Total Earned JD Program Points: 58.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	Harlan Fiske Stone	2L

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am delighted to write this letter in enthusiastic support of the application of Lizamaría Arias for a clerkship in your chambers. She is a serious thinker, and one of the most ambitious and rigorous students I have ever supervised.

This spring semester, Liza enrolled and participated in my seminar on International Arbitration in Latin America, which I have been teaching at Columbia Law School on a regular basis for many years. The seminar is taught in the Spanish language every other year, so that bilingual students (English-Spanish) have the opportunity to get acquainted with Spanish legal terminology, while learning the approach of Latin American legal systems to international commercial arbitration. Liza was one of my students.

Liza is fluent in Spanish and came to this course without previous exposure to international arbitration, attracted by her need to use and polish her command of the Spanish language. She turned out to be an active and enthusiastic participant in this seminar. She eagerly engaged in class discussion, more often than not raising a point above the crowd, evidencing reasoning skills with an unusual ability for critical thinking and legal analysis. I vividly recall an impressive presentation she gave to our class, discussing significant differences between commercial and investment disputes in which public international law plays a prominent role.

Her excellent seminar paper focused on three arbitral awards rendered under the ICSID Convention and bilateral investment treaties concluded by Argentina. Re-reading this paper for the purposes of this recommendation. I realize that she paid careful attention to the assigned readings, relying on creative thinking of her own in order to offer thoughtful and constructive proposals to improve the current mechanism to settle international investment disputes. I was thrilled when, after the term was over, Liza confirmed her commitment to pursue a semester abroad at the University of Buenos Aires Law School, an experience which I trust will contribute significantly to her legal education.

Outside the classroom, Liza´s personal features make her ideal candidate to fit into a close work environment. She is quiet and inquisitive, friendly, and unassuming. This is a rare mix of qualities, combining modesty, diligence, and collegiality. I trust that Liza ´s ability to be a team player and to get along with others conform the type of qualities which judges are likely to seek from an effective, helpful, and personable law clerk.

I strongly recommend Lizamaría Arias to you. She will carry out superbly the duties of a clerk in your chambers, and I am confident she will work well with other members of your staff.

I am available for a follow-up e-mail or phone call, should you find it necessary or convenient, in order to provide any further assistance.

Yours truly,

Prof. Alejandro M. Garro

Alejandro Garro - garro@law.columbia.edu - 212-854-2692

June 10, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is my pleasure to recommend Lizamaria Arias for a clerkship in your chambers. Liza is a rising third-year student at Columbia Law School who serves as the Diversity, Equity, and Inclusion Chair of the *Columbia Law Review* as well as a leader of the Asylum and Refugee Moot Court. She is an excellent writer who has a fierce intellectual curiosity, an enthusiastic and joyful spirit, and a deep compassion for others that would make her an excellent law clerk. I recommend her to you highly.

I have gotten to know Liza as the professor of her Constitutional Law small group during her first semester of law school and the professor of her Legislation and Regulation section during her second year. In both courses, Liza was a terrific class participant. She was always well prepared for class and brought exceptional engagement to our discussions. I recall, for example, her contributions to our class discussion on United States v. Virginia and the question of whether single-sex schools are consistent with the Equal Protection Clause. Although most students maintained that they were not, Liza offered a spirited defense of women's colleges, drawing on her own experience at Wellesley College, where, for the first time in her life, she threw herself into academic challenges without being told that they were "too advanced" for her. In our conversation, she was able to integrate a compelling personal narrative with attention to doctrinal frameworks and historical developments in the manner of the best legal arguments.

I have gotten to see more of Liza's intellectual curiosity in office-hours discussions over the past two years. From discussions of commandeering, preemption, and disparate impact in Constitutional Law to conversations about invalidly promulgated legislative rules, Chevron deference, and nondelegation in Legislation and Regulation, Liza evidenced a deep engagement with the full range of class material, as well as an ability to focus on the important questions. She consistently sought to understand the details of statutes, rules, and court decisions and also to push deeper, wrestling with the normative questions they raised. Based on her contributions to class discussions as well as my conversations with her outside of class, I was surprised by Liza's exam grades of B+ in both courses she took with me. In these courses as in others, timed final exams do not represent her intellectual strengths. Academically, she has shone in other pursuits, particularly those that foreground legal writing. To her credit, however, Liza has not chosen to shy away from exam-based courses; as she put it to me, though she hasn't always been the strongest timed-test-taker, she loves law school classes and wants to avail herself of as many opportunities to learn as possible while she attends Columbia.

Liza's attitude toward law school classes reflects her general upbeat and energetic personality. She is warm, friendly, and unflappable, and she throws herself into everything she does with enthusiasm. For instance, during the pandemic, she started a financial coaching business to teach first-generation women of color about budgeting, investing, and ensuring their professional plans enhance their financial prospects. To do this work, Liza created an accessible personal finance curriculum, incorporated a business, filed taxes, pitched herself for podcasts and panels, and negotiated contracts. And she continues to undertake community-minded entrepreneurship.

In work and school alike, Liza has proven adept at leading with integrity and compassion, working well in stressful conditions, and creating a positive environment for others. These qualities would make her a trusted law clerk and a pleasure to have in chambers. If I can be of any further assistance as you consider Liza's application, please do not hesitate to contact me.

Sincerely yours,

Jessica Bulman-Pozen

Jessica Bulman-Pozen - jbulma@law.columbia.edu - 212-854-1028

LIZAMARIA ARIAS
Columbia Law School, J.D. 2024
100 La Salle St., Unit MG, NY, NY 10027
(301) 957-1973 • la2866@columbia.edu

Writing Sample —— Moot Court Brief

The following writing sample is an excerpt of a brief I wrote for the Latinx Law Student Association (LaLSA) Asylum and Refugee Moot Court, a specialized legal writing and oral advocacy program at Columbia Law School. The appeal originates from the fictitious Fourteenth Circuit. The competition rules prohibit the citation of cases decided or legislation enacted after November 9, 2021. The writing is substantially my own and incorporates light edits from my instructor and student editor.

My partner and I were assigned to write for the Petitioner—a challenging task because most available case law did not support our position. The following, excerpted brief illustrates my ability to analyze the nuances of unfavorable case law and craft novel arguments. The statement of facts, summary of the argument, and Part I of the brief (an asylum issue written by another student) are omitted for brevity. I have summarized the facts and procedural posture below.

Abbreviated Statement of Facts

Nur Khat is an artist seeking refuge from a socially conservative regime in his home country of Shikor. Mr. Khat drew the ire of Shikorians for painting murals depicting men in positions of subservience to women. Concerned for his safety, he fled to the United States, where he entered without authorization. In the United States, Mr. Khat obtained an Individual Taxpayer Identification Number (ITIN), which he used to pay taxes. He was eventually turned into U.S. Immigration and Customs Enforcement by a neighbor, indicted, and found guilty under 42 U.S.C. § 408(a)(7)(B) for falsely representing a social security number. Mr. Khat was placed in removal proceedings and he immediately filed for asylum and, alternatively, cancellation of removal.

Abbreviated Statement of Proceedings

The immigration judge (IJ) found Mr. Khat removable as charged and the Board of Immigration Appeals (BIA) affirmed. The BIA found that Mr. Khat's misuse of a social security number qualified as a crime involving moral turpitude (CIMT) in violation of § 1229b(b)(C), and by extension, 8 U.S.C. § 1229b(b)(1)(B). On appeal, the Fourteenth Circuit vacated the BIA's finding on cancellation of removal, explaining that Mr. Khat's actions satisfied the "culpable mental state" element of the two-pronged CIMT analysis, but failed the "reprehensible conduct" prong. The government appealed to the United States Supreme Court.

II. MR. KHAT SHOULD NOT BE BARRED FROM SEEKING CANCELLATION OF REMOVAL BECAUSE USING A FALSE SOCIAL SECURITY NUMBER DOES NOT CONSTITUTE A CRIME INVOLVING MORAL TURPITUDE.

Mr. Khat did not commit a Crime Involving Moral Turpitude (CIMT). Although the Immigration and Nationality Act (INA) does not define CIMTs, courts have generally held that these crimes involve two elements: "Reprehensible conduct" and a "culpable mental state." *Matter of Cristoval Silva-Trevino*, 26 I. & N. Dec. 826, 834 (BIA 2016). The Fourteenth Circuit found that Mr. Khat satisfied the "culpable mental state" element, and that is not challenged on appeal. Mr. Khat's use of a false social security number (SSN), however, is not morally turpitudinous because it is not a "reprehensible" act and thus fails the conjunctive test for CIMTs.

Moreover, legislative history makes clear that Congress did not intend for SSN misuse to categorically constitute a CIMT because it is not inherently "base, vile, or depraved"—elements that typically inhere in reprehensible conduct. *Arias v*. *Lynch*, 834 F.3d 823, 826 (7th Cir. 2016). Although Mr. Khat's conduct might be statutorily prohibited, moral turpitude involves acts which are *per se* morally reprehensible, not merely prohibited by statute. Mr. Khat's case can be distinguished from CIMTs on those grounds. *In re Flores*, 17 I. & N. Dec. 225, 227 (BIA 1980).

Mr. Khat made an unfortunate error in his effort to pay his dues to society. As multiple jurisdictions note, however, not all crimes involving deception automatically qualify as CIMTs. *See Arias v. Lynch*, 834 F.3d 823, 828 (7th Cir. 2016) ("Cases finding crimes of moral turpitude based on deception rely on other aggravating factors, especially actual or intended harm to others."). Mr. Khat's case presents no aggravating factors and certainly did not harm or injure anyone. To the contrary, he presented a false SSN in an effort to be a responsible member of his newfound community. Therefore, this Court should find that Mr. Khat is eligible for cancellation of removal because his crime does not meet the requirements for a CIMT.

Deciding whether Mr. Khat's conviction is a CIMT requires applying this Court's categorical approach, which looks only to the "fact of conviction and the statutory definition of the predicate offense, rather than to the particular underlying facts." *Taylor v. United States*, 495 U.S. 575, 576 (1990). The legal decisions of the Board of Immigration Appeals (BIA) and Immigration Judge (IJ) are reviewed *de novo. Rodriguez v. U.S. Atty. Gen.*, 735 F.3d 1302 (11th Cir. 2013). Whether Mr. Khat's use of a false SSN constitutes a CIMT is a legal question, and thus must also be reviewed *de novo*. *See e.g., Davila v. Barr*, 968 F.3d 1136, 1141 (9th Cir. 2020).

A. Mr. Khat's use of a false SSN does not fall within the scope of morally turpitudinous conduct because it is neither reprehensible nor fraudulent.

To determine whether a crime qualifies as a CIMT, courts employ a categorical approach and evaluate the conviction without taking into account external facts. As noted *supra*, a CIMT consists of two essential elements: Reprehensible conduct and a culpable mental state. *See Matter of Silva-Trevino* (*Silva-Trevino III*), 26 I. & N. Dec. 826, 834 (BIA 2016); *Nino v. Holder*, 690 F.3d 691, 695 (5th Cir. 2012). Because Mr. Khat's culpable mental state is not at issue on appeal, that element is not analyzed *infra*. R. at 6. However, because Mr. Khat's conduct is not reprehensible, it falls outside the scope of the second prong and fails the conjunctive test. Thus, Mr. Khat is not guilty of committing a CIMT and is eligible for cancellation of removal.

i. <u>Mr. Khat's conduct is not "reprehensible" because it neither causes injury nor shocks the public conscience.</u>

Misuse of a SSN pales in gravity and effect in comparison to the types of offenses typically classified as CIMTs. Reprehensible conduct "shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *In re Solon*, 24 I. & N. Dec. 239, 240 (BIA 2007). Crimes like murder, rape, robbery, kidnapping, voluntary manslaughter, aggravated assault, child abuse, and

incest are CIMTs. *See Orosco v. Holder*, 396 F. App'x 50, 54 (5th Cir. 2010). Mr. Khat's action did not physically harm anyone, nor was it violent in nature. Far more egregious acts fall short of being considered CIMTs. For example, in *Jean-Louis v. Attorney General*, where the defendant was convicted of assaulting his wife's twelve-year-old daughter, the Third Circuit held that a simple assault, such as physically striking another person, does not constitute a CIMT. 582 F.3d 462, 469 (3d Cir. 2009). Mr. Khat used a false SSN; he did not come close to engaging in violent or otherwise analogous conduct.

Courts are reluctant to deem harmless crimes (i.e., conduct that does not injure an individual or society) CIMTs. In *Beltran-Tirado v. INS*, the Ninth Circuit held that misuse of a SSN should not be considered a CIMT if the conduct at issue did not create harm. 213 F.3d 1179, 1183 (9th Cir. 2000). Beltran-Tirado, who had been living in the United States for decades, was charged with using another woman's SSN and presenting it as her own. *Id.* at 1181. Because Beltran-Tirado used the SSN for lawful, harmless purposes, her crime was not a CIMT. *Id.* Similarly, in *Ahmed v. Holder*, the Second Circuit reasoned that most of the clauses in the statute at issue include either the intent to disrupt government function or to receive a benefit. 324 F. App'x 82, 83 (2d Cir. 2009) (examining § 408(a)(7) to find that CIMTs involve an intent to disrupt a governmental function or to receive a benefit, neither of which is present in Mr. Khat's case). The court found that petitioner's conduct did not involve those usual elements and therefore was not a CIMT. *Id.* The Tenth Circuit went further, holding that even providing false information to a city official during an investigation did not constitute a CIMT. *Flores-Molina v. Sessions*, 850 F.3d, 1150, 1160 (10th Cir. 2017). To violate a statute, a false statement does not necessarily have to involve fraud, cause harm, or give a benefit to the person making the statement. *Id*. Flores-Molina argued that the Denver Code provision did not include an explicit element of "fraud" or "intent to deceive"

which is typically necessary for a CIMT statute. *Id.* Molina argued that mere dishonesty, without more, did not meet the threshold for a CIMT. *Id.* The court agreed, holding that the minimum conduct required for a statutory violation fell outside of what is needed to constitute a CIMT. *Id.* When considered in the context of these more serious cases, it is clear that Mr. Khat misusing a SSN is not a CIMT.

Mr. Khat's conduct is not reprehensible and therefore is not a CIMT. As noted *supra*, reprehensible conduct refers to conduct that is "base, vile or depraved." *See Rodriguez–Herrera v. INS*, 52 F.3d 238, 240 (9th Cir. 1995). When making this determination, courts look to accepted social norms and moral standards to determine whether the act in question rises to that level. *Id.* It would not follow, under typical social norms and moral standards, to claim that misusing a SSN—an unassigned one—would "shock [a person] to their conscience" or be considered "depraved," as the BIA's definition of moral turpitude requires. Mr. Khat's conduct is harmless and lacks the reprehensible elements that CIMTs typically include such as violence, harm to others, and harm to society. Therefore, his conduct is not reprehensible.

ii. Mr. Khat's conduct does not involve fraud, which is often a necessary element of morally turpitudinous conduct.

Fraud is a critical part of CIMT determinations, and Mr. Khat's conduct does not involve fraud. "Fraud has consistently been regarded as such a contaminating component . . . that American courts have, without exception, included such crimes within the scope of moral turpitude." *Jordan v. De George*, 341 U.S. 223, 228 (1951). Petitioner will likely attempt to conflate fraud and deceit in an attempt to downplay the distinction between the two terms and argue that Mr. Khat is guilty of fraud. This is a false equivalency. "Deceit" and "fraud" are legally distinct terms. Black's Law Dictionary defines fraud as "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment."

Fraud, Black's Law Dictionary (10th ed. 2014). Interpreting the inducement portion of this definition, the Second Circuit held that deceit does not necessarily involve fraud. *Ahmed v. Holder*, 324 F. App'x 82, 84 (2d Cir. 2009). Fraud requires an intent to either obtain a benefit or cause a detriment—whether to the United States government or another person. *Id.*

To illustrate the distinction between fraud and deceit, consider a woman who, for safety reasons, leaves a large pair of men's shoes in front of her apartment door to trick passersby into believing a man lives there. This woman has not created harm and has not defrauded anyone into acting to his or her detriment. She has simply deceived people into believing she is not alone in her home. Or similarly, consider a family that places a "beware of dog" sign on their front gate despite not owning a canine. Deception exists in both of these examples, but they lack the elements that would make their acts fraudulent—specifically, "inducing someone else to act to his or her detriment." *Id.* Mr. Khat's conduct, while not strictly the same as the examples above, is analogous because it constitutes deceit but did not create harm, either for the government or for another entity. The distinction between fraud and deceit is particularly relevant in Mr. Khat's case where his conduct's only effects were that he was able to work in the United States and as a result, contribute to society by paying taxes.

iii. Absent fraud, Mr. Khat's conduct is missing the "intent to harm" element which is almost always necessary for a crime to be considered a CIMT.

When a crime has no fraud element, it cannot be a CIMT without intent to harm. *See Saavedra-Figueroa v. Holder*, 625 F.3d 621, 626 (9th Cir. 2010) ("[n]on-fraudulent CIMTs 'almost always involve an intent to harm someone.'"). That intent is lacking from Mr. Khat's conduct. Petitioner will likely make two arguments in response to this. First, Petitioner will note there are offenses that neither involve fraud nor the specific intent requirement but are considered CIMTs regardless. In every one of those cases, however, the criminal act causes harm to the

government, society, or another entity. *See, e.g., Matter of Flores*, 17 I. & N. Dec. 225, 225 (BIA 1980) (concerning the selling of counterfeit papers and impairing government function); *Wittgenstein v. INS*, 124 F.3d 1244, 1246 (10th Cir. 1997) (dealing with the "willful evasion of federal income taxes" which similarly negatively impacts government function). Misuse of a social security number does not inherently cause harm, and it certainly does not do so in Mr. Khat's case. Therefore, not only is Mr. Khat's conduct devoid of fraud, but it also lacks the necessary harm element.

Second, Petitioner will likely argue that this Court cannot consider Mr. Khat's intent because the categorical approach "focuses on the inherent nature of the crime, as defined in statute . . . rather than the circumstances surrounding the particular transgression." *Villegas-Sarabia v. Sessions*, 874 F.3d 871, 877 (5th Cir. 2017). However, even without considering the facts of the case, it is still true that an individual cannot be convicted of a CIMT for misusing a SSN. Because the conduct, as established *supra*, not only lacks fraud, but also lacks the critically important intent to harm, it cannot be a CIMT. *See Nunez v. Holder,* 594 F.3d 1124, 1131 (9th Cir. 2010) ("A review of BIA and Ninth Circuit precedent reveals that non-fraudulent crimes of moral turpitude almost always involve an intent to harm someone, the actual infliction of harm upon someone, or an action that affects a protected class of victim.") (rev'd on other grounds). Therefore, because there is no fraud element present, no "intent to harm" element present, and no legal basis for overriding the general presumption that these are necessary elements of CIMTs, the Petitioner's argument fails.

B. The immigration rule of lenity exists for situations like Mr. Khat's and should be applied here.

The rule of lenity provides immigrants with some degree of protection during deportation, which "is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). At its core, the rule of lenity advocates for the narrowest possible reading of a statute where Congress has been ambiguous in its intent. *See Yates v. United States*, 574 U.S. 528, 548 (2015) ("[A]mbiguity . . . concerning . . . statutes . . . should be resolved in favor of lenity."); *see also Fong Haw Tan v. Phelan*, 333 U.S. at 9–10 (relying on relevant legislative history, this Court construed the statute at issue in favor of the asylum seeker, noting that doubts concerning the statute's scope should be resolved in favor of the applicant). In Mr. Khat's case, the statute at issue is ambiguous as to whether misusing a SSN qualifies as a CIMT. Because this Court has previously construed such ambiguity in favor of applying the rule of lenity, precedent urges the same conclusion in Mr. Khat's case. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (noting this Court's "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [asylum seeker]."). There is sufficiently compelling reason to apply the rule of lenity to Mr. Khat's case. If the Court remains unconvinced, however, an analysis of Congress's amendment of § 408(d) and its significance to the overall statutory scheme lends further support to the argument.

i. This Court's prior holdings support the rule's application.

This Court has previously held that "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952). In *Delgadillo v. Carmichael*, this Court considered a Mexican national who lived undocumented in the United States for two decades. 332 U.S. 388, 390 (1947). On a voyage from Los Angeles to New York

in 1942, his ship was torpedoed and he was taken to the American consulate in Havana for treatment, where he subsequently reentered the United States. *Id.* Two years later, in 1944, he was sentenced to over a year in prison for committing an armed robbery. *Id.* at 389. The statute at issue in *Delgadillo* was § 19(a) of the Immigration Act of 1917:

> [A]ny [noncitizen] who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States shall . . . be taken into custody and deported.

Id. at 390. Delgadillo's deportation hinged on the interpretation of whether his return to the United States from Cuba constituted "entry of the [undocumented person] to the United States." *Id.* A reentry would place his conviction of a CIMT within the five-year time period laid out by the statute, thereby satisfying the requirements for deportation. *Id.* at 391. In making its determination this Court explained:

> [W]e will not attribute to Congress a purpose to make [Delgadillo's] right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the [undocumented person] are too irrational to square with the statutory scheme.

Id. Mr. Khat's case is similarly situated. Whether he is eligible for cancellation of removal rests on this Court's interpretation of what a CIMT is and whether SSN misuse qualifies as one. This Court's prior decisions clearly support the application of the rule of lenity in cases like Mr. Khat's. However, any remaining doubt can be dispelled by analyzing the context in which the statute was drafted—once reviewed, it becomes evident that to interpret the statute in a way that is detrimental to Mr. Khat, instead of employing the rule of lenity as an interpretive tool, would do a great disservice not only to Mr. Khat but to the integrity of the statutory scheme in general.

ii. Congress's amendment of the statute further urges the application of the rule of lenity and indicates that Congress did not intend misuse of a SSN to be categorically considered a CIMT.

Congress did not intend for misuse of a SSN to be categorically classified as a CIMT, and therefore Mr. Khat's conduct should not be categorized as such. In 1990, Congress amended 42 U.S.C. § 408(a)(7)(B), the statute under which Mr. Khat was convicted—an action which suggests there is congressional support for a narrower interpretation of what convictions constitute a CIMT. *Beltran-Tirado v. INS*, 213 F.3d 1179, 1184 (9th Cir. 2000). Congress added a subsection, § 408(d), which limited prosecution under § 408. *See* H.R. Rep. No. 101–964, at 948 (1990) (Conf. Rep.). The amendment exempts permanent residents from prosecution if they request a social security card after having previously used a false one. *Id.* The exemption is limited to instances where an undocumented person used a false social security number for otherwise legal purposes. H.R. Rep. No. 101–964, at 948. A common, but incomplete, counterargument is that the amendment's scope does not extend to the particular section under which Mr. Khat was convicted. However, in *Beltran-Tirado,* the Ninth Circuit found Congress's rationale to be illustrative of Congress's general understanding that false use of a SSN is not categorically a CIMT. 213 F.3d 1179, 1184 (9th Cir. 2000).

Petitioner may argue that if Congress meant to give the amendment wider applicability, it could have extended the amendment to the other relevant sections. However, there may be many reasons why Congress chose not to amend the statute more broadly, including that Congress believed its general analysis would be understood to preclude the sweeping view that all SSN misuse constitutes a CIMT. *See* Nathanael C. Crowley, Note, *Naked Misuse: Misuse of a Social Security Number for an Otherwise Legal Purpose May Not Be a Crime Involving Moral Turpitude After All*, 15 SAN DIEGO INT'L L.J. 205, 223 (2013) (discussing congressional intent). Though the court in *Beltran-Tirado* acknowledged the amendment's narrow scope, that recognition does not undermine its applicability to Mr. Khat's case. The particular exception carved out by the court's

rationale in *Beltran-Tirado* pertains precisely to 42 U.S.C. § 408, the same statute at issue here. Thus, when evaluating congressional intent, both the plain text of the statute and the surrounding legislative context support the conclusion that Mr. Khat's use of a false, unassigned SSN falls into the scope of conduct that Congress did not intend to categorically constitute a CIMT.

C. Both legal concepts of morality and public policy caution against classifying Mr. Khat's crime as a CIMT .

Because CIMTs are not statutorily defined, distinguishing between *malum in se* and *malum prohibitum* crimes is a critical element of the analysis. Courts have generally understood that statutory violations, without more, are insufficient to classify conduct as morally turpitudinous. In addition to this important distinction, public policy considerations weigh heavily against categorizing SSN misuse as a CIMT. The determination would run contrary to the values that have long underpinned American legal and social systems. Mr. Khat's case is a prime example for the exercise of prosecutorial discretion—especially considering that there are no competing governmental interests that would caution against an exercise of discretion. If anything, in providing clarity to this muddled legal space, the government's interests would be furthered—legal consistency and judicial efficiency would both increase.

i. Mr. Khat's conviction is for a *malum prohibitum* crime and thus is not morally turpitudinous.

Because CIMTs have no statutory definition, the distinction between crimes that are *malum in se* versus *malum prohibitum* is critical to the analysis. As the Tenth Circuit noted, "[m]oral turpitude reaches conduct that is inherently wrong, or *malum in se*, rather than conduct deemed wrong only because of a statutory proscription, *malum prohibitum*." *Efagene v. Holder*, 642 F.3d 918, 921 (10th Cir. 2011). The *Efagene* court further explained that for "an offense to involve moral turpitude, it must require a reprehensible or despicable act" and "necessarily involve an evil

intent or maliciousness in carrying out th[at] reprehensible act." *Id.* at 921–22. Thus, conduct that is statutorily criminalized, without more, is not enough to meet the required elements of a CIMT. In Mr. Khat's case, he was convicted under statute, but the conviction itself did not meet the elements of a "reprehensible or despicable act" necessary for a CIMT, as analyzed previously. *See supra* Section A. Therefore, Mr. Khat is guilty of a *malum prohibitum* offense, not a *malum in se* offense.

Because Mr. Khat's conduct was not *malum in se*, it should not be considered a CIMT. The BIA previously described moral turpitude as an act which is "per se morally reprehensible and intrinsically wrong or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." *In re Flores*, 17 I. & N. Dec. 225, 227 (BIA 1980). In *Goldeshtein v. INS*, the Ninth Circuit found that "whether a crime involves moral turpitude turns on whether evil intent . . . is an essential element of the crime." 8 F.3d 645, 647 (9th Cir. 1993); *see also Mendez v. Barr*, 960 F.3d 80, 84 (2d Cir. 2020). While the Fourteenth Circuit found the culpable mental state in Mr. Khat's case satisfied, a culpable mental state is not synonymous with evil intent. Evil intent is better analyzed under the reprehensible conduct element prong of the CIMT test. It is possible to find a culpable mental state without evil intent. For example, in *Arias*, the court gave the example of a parent who, being able and willing to pay for medical services, presents a false SSN to a hospital so that their child receives care. *Arias v. Lynch*, 834 F.3d at 826. Evil intent does not inhere in this example, despite the parent's knowing misuse of a SSN. *Id.* Similarly, in Mr. Khat's case the Fourteenth Circuit found the culpable mental state element satisfied, however, it does not necessarily follow that evil intent was also present. Convictions for misuse of a SSN can occur under such varied circumstances that relying only on statutory prohibition results in a dangerously broad conception of the issue.

ii. Policy considerations weigh against the conclusion that social security misuse is categorically a CIMT.

There are strong policy implications that cut against categorizing misuse of a SSN as a CIMT. Construing Mr. Khat's conviction as a CIMT places the misuse of a SSN, an administrative mistake, on par with conduct that is actually depraved like murder, sexual abuse of a child, and assault. This understanding of the statutory scheme is illogical and disadvantages otherwise law-abiding individuals trying to rebuild their lives after experiencing harrowing events in their home countries. This case presents an opportunity to carve out a uniform understanding of CIMTs, to resolve a circuit split, and to do so in a way that is in line with both legal principles and the history of the United States—a rich history that immigrants have played a critical part in enriching and developing.

Pinpointing what behavior constitutes a CIMT is a problem that has plagued the judicial system for decades. As Judge Posner aptly pointed out in his concurrence in *Arias,* "[h]as the Justice Department nothing better to do with its limited resources than prosecute a mouse? Has prosecutorial discretion flown out the window? . . . She did not steal or invent the social security number; it was given to her . . ." *Id.* at 834. Here, the same question is called to mind. Is this the best use of limited judicial resources or would expenditure of these resources be best spent elsewhere and not in deporting a law-abiding person with a spouse and two American children?

CONCLUSION

This Court should hold that Mr. Khat's conviction for misuse of a SSN under 42 U.S.C. § 408(a)(7)(B) does not constitute a CIMT, and thus should not bar his application for cancellation of removal. Mr. Khat's conduct does not meet the required "reprehensibility" threshold for CIMTs. Mr. Khat's conviction involves neither "vile, debased, or depraved" conduct nor fraudulent intent. It is absurd to equate the presentation of a false SSN to CIMTs like sexual abuse

of a minor or murder. Moreover, the congressional record shows that Congress does not categorically perceive SSN misuse as rising to the level of a CIMT. Finally, crimes that are *malum in se* constitute CIMTs, while crimes that, like Mr. Khat's, are merely *malum prohibitum* (statutorily prohibited) are not necessarily classified as such. For the aforementioned reasons, Mr. Khat's conduct does not constitute a CIMT, and should not bar him from seeking discretionary relief. This case presents a unique opportunity for this Court to resolve a vexing circuit split and to do so with nuanced consideration of the challenges and complexities facing asylum seekers in the United States. We respectfully ask the Court to uphold the Fourteenth Circuit's finding on cancellation of removal.

Applicant Details

First Name	**Donald**
Last Name	**Arrington**
Citizenship Status	**U. S. Citizen**
Email Address	**don.arrington@temple.edu**
Address	**Address** Street **10 Windward Dr.** City **Barnegat** State/Territory **New Jersey** Zip **08005**
Contact Phone Number	**(732)779-4276**

Applicant Education

BA/BS From	**California State University-Northridge**
Date of BA/BS	**May 2020**
JD/LLB From	**Temple University--James E. Beasley School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23905&yr=2011**
Date of JD/LLB	**May 20, 2024**
Class Rank	**20%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Temple University Moot Court Competition Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Maneri, Paul
PManeri@pdsdc.org
Knauer, Nancy
nancy.knauer@temple.edu
215-204-1688

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Don Arrington
10 Windward Dr., Barnegat, NJ 08005 | 732-779-4276 | don.arrington@temple.edu

May 25, 2023

The Honorable Juan R. Sánchez
Chief United States District Judge
for the Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

I am currently a third-year law student at Temple University, and I am writing with tremendous enthusiasm to apply for a clerkship in your chambers starting in August 2024 or at any point thereafter.

I am applying to clerk in your chambers because, as an aspiring appellate public defender, your career commitment to public service is an inspiration to me and something I would like to model in my own professional life. I am confident that a clerkship in your chambers will help me become the strongest advocate possible.

From a young age, my parents instilled in me a sense of hard work and determination. When I was growing up, my father worked three jobs and my mother worked two. It was a struggle for them to get us into and keep us in our lower-middle class neighborhood. I know firsthand the pain and violence that economic struggles can cause, so I am determined to provide excellent representation to low-income criminal defendants.

During law school, I completed internships with the Federal Community Defender Office for the Eastern District of Pennsylvania, the Public Defender Service for the District of Columbia, and this summer I will be interning at the Federal Public Defender's Office for the District of New Jersey. Through those experiences, I have been able to develop the analytical research and writing skills that will make me an effective advocate and clerk. While at the Federal Community Defender Office, I prepared a number of written analyses, including two supervised release early termination motions, a memorandum analyzing the viability of filing a motion to suppress a photo array identification, and another memorandum regarding new defenses to firearms charges in light of *New York State Rifle & Pistol Association, Inc. v. Bruen*.

I am also a member of the Temple University Moot Court Competition team, which I have found immensely rewarding and helpful in developing legal writing and reasoning skills. As part of that experience, I have prepared a brief analyzing First Amendment and Pennsylvania Constitutional issues. I look forward to another year on the team, which will further develop my legal writing skills. Additionally, I am looking forward to my yearlong enrollment in Temple's Federal Appellate Litigation Clinic, where I will work on an appellate brief and response for an indigent client at the Third Circuit.

Enclosed please find my resume, law school transcript, undergraduate transcripts, and writing sample. The following individuals are submitting letters of recommendation and welcome inquiries:

Paul Maneri
Staff Attorney, Appellate Division
Public Defender Service
pmaneri@pdsdc.org
(202) 336-4094

Nancy Knauer
Director, Law & Public Policy Program
Temple, Beasley School of Law
nancy.knauer@temple.edu
(215) 204-1688

Respectfully,

Don Arrington

Don Arrington
10 Windward Dr., Barnegat, NJ 08005 | 732-779-4276 | don.arrington@temple.edu

EDUCATION

Temple University, Beasley School of Law, Philadelphia, PA
J.D. and Certificate of Trial Advocacy — Expected May 2024

GPA: 3.59 (top 20%)

Honors:
Moot Court Competition Team 2023 – 2024
Distinguished Class Performance, Criminal Procedure I 2022
Outstanding Oral Advocacy, Legal Research and Writing II 2022
Outstanding Oral Advocacy, Trial Advocacy I 2022
Black Public Defender Association Summer Fellow 2022
Rubin-Presser Social Justice Fellow 2021 – 2024
Law and Public Policy Scholar 2022
Beasley Scholar 2021 – 2024
Dean's List (all semesters)
The Appellate Project Mentee 2022 – 2023

Leadership:
Future Articles Editor – Political and Civil Rights Society 2023 – 2024
President – Political and Civil Rights Society 2022 – 2024
Co-President – National Lawyers Guild (NLG) 2022 – 2023

California State University, Northridge, Northridge, CA
B.A. in Cinema and Television Arts: Screenwriting, *summa cum laude* — May 2020
Honors: *Dean's List (all semesters)*

LEGAL WORK EXPERIENCE

Federal Appellate Litigation Clinic, Temple University, Philadelphia, PA
Future Clinical Intern — Aug. 2023 – May 2024

Federal Public Defender, District of New Jersey, Camden, NJ
Legal Intern — May 2023 – Aug. 2023

Federal Community Defender Office, Eastern District of Pennsylvania, Philadelphia, PA
Clinical Intern — Jan. 2023 – May 2023

- Researched and wrote memorandum on the boundary between completed Hobbs Act robbery and attempt
- Researched and wrote memorandum on photo array identification suppression viability
- Researched and wrote two supervised release early termination motions

Systemic Justice Clinic, Temple University, Philadelphia, PA
Clinical Intern — Aug. 2022 – Dec. 2022

- Researched and compiled *Brady* disclosure and *Frye* evidentiary challenges to surveillance technologies used by Philadelphia Police Department
- Authored white paper aimed at transparency regarding police use of surveillance technologies
- Interviewed public defenders and community stakeholders about the effects of police use of technology

Public Defender Service for the District of Columbia, Washington, D.C.
Summer Law Clerk / Appellate Division May 2022 – Aug. 2022

- Researched and completed an analysis and categorization of kidnapping statutes from all 50 states in preparation for a brief to the D.C. Court of Appeals sitting en banc
- Researched and drafted motion for compassionate release
- Researched, analyzed, and synthesized studies about sexual offender treatment programs
- Compiled information about COVID-19 risk factors in prisons and prepared report
- Mooted attorneys for three oral arguments before the D.C. Court of Appeals
- Observed three oral arguments and participated in subsequent office-wide debriefs
- Conducted client interview and shadowed attorneys in D.C. Superior Court

Pardons Clinic, NLG, Temple University Chapter, Philadelphia, PA
Pardons Coach / 1L Representative Oct. 2021 – May 2022

- Assisted clients in drafting, strategizing, and submitting pardons applications; Conducted client interviews
- Reviewed and secured clients' court records; Gathered and prepared supporting documentation

Expungement Clinic, NLG, Temple University Chapter, Philadelphia, PA
Volunteer Fall 2021, Spring 2022

- Assisted Community Legal Services lawyers in advising five clients on their expungement options
- Communicated with clients regarding their expungement petitions and Community Legal Services intakes

ADDITIONAL WORK EXPERIENCE

Barnegat School District, Barnegat, NJ
Substitute Teacher Jan. 2023 – Present

- Teach and manage classrooms in various Pre-K-12 schools

National Association of Public Defense, Rise, Resist Represent Conference
Zoom Producer Feb. 2023 – Mar. 2023

- Managed Zoom production for seven panels and discussions

Upward Bound, California State University, Northridge, Northridge, CA
Tutor/Mentor and Student Assistant Oct. 2018 – May 2020

- Tutored and advised students at six high schools about graduation requirements and college admissions

EPIC, College of the Redwoods, Eureka, CA
Supplemental Instructor Aug. 2017 – May 2018

- Created and implemented lesson plans for freshman and sophomore English classes and study sessions

Visitation Relief Center, Brick, NJ
Community Support Staff Aug. 2013 – Oct. 2014

- Maintained community garden in an urban farm setting and assisted with community wellness workshops

Kaya's Kitchen, Belmar, NJ
Cook/Manager June 2010 – Aug. 2013, Jan. 2021 – Aug. 2021

- Opened and closed the restaurant, placed orders, managed employee schedules, cooked and cleaned

Interests: music, guitar, theater, film, poetry, camping, baseball, novels, podcasts, tennis, gardening, cooking

Don Arrington

Student Academic Transcript

Academic Transcript

Transcript Level

Law

Transcript Type

Advising Transcript

Student Information | Institution Credit | Transcript Totals | Course(s) in Progress

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Student Information

Name

Donald Arrington

Student Type

Continuing Degree Seeking

Curriculum Information

Current Program : Juris Doctor

Program	College	Campus
Law--Full Time	Law, Beasley School	Main

Major and Department

Law--Full Time, Law: Beasley School of Law

Institution Credit

Term : 2021 Fall

College

Law, Beasley School

Major

Law--Full Time

Student Type

First Time Professional

Academic Standing

Not Calculated

Additional Standing

Dean's List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	0402	Main	LW	Civil Procedure I Heath, J	B	4.000	12.00		
JUDO	0406	Main	LW	Contracts Baron, J	B+	4.000	13.32		
JUDO	0414	Main	LW	Legal Research & Writing Morrow, D	A-	3.000	11.01		
JUDO	0420	Main	LW	Torts Rahdert, M	A	4.000	16.00		
JUDO	0437	Main	LW	Intro to Transactional Skills Monroe, A	S	1.000	0.00		

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	15.000	52.33	3.49
Cumulative	16.000	16.000	16.000	15.000	52.33	3.49

Term : 2022 Spring

College
Law, Beasley School

Major
Law--Full Time

Student Type
Continuing Degree Seeking

Additional Standing
Dean's List

Term Comments
Semester Notations:

OOA (Legal Research & Writing II)

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	0404	Main	LW	Constitutional Law Dunoff, J	A-	4.000	14.68		
JUDO	0410	Main	LW	Criminal Law I Shellenberger, J	A-	3.000	11.01		
JUDO	0414	Main	LW	Legal Research & Writing Morrow, D	A-	2.000	7.34		
JUDO	0418	Main	LW	Property Wells, C	B+	4.000	13.32		
JUDO	0550	Main	LW	Immigration Law Spiro, P	B+	3.000	9.99		

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	16.000	56.34	3.52
Cumulative	32.000	32.000	32.000	31.000	108.67	3.51

Term : 2022 Summer I

College
Law, Beasley School

Major
Law

Student Type
Continuing Degree Seeking

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	W510	Main	LW	Institutional Decision Making	B	3.000	9.00		
JUDO	W910	Main	LW	Law and Public Policy Knauer, N	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	6.000	6.000	6.000	6.000	21.00	3.50
Cumulative	38.000	38.000	38.000	37.000	129.67	3.50

Term : 2022 Fall

College
Law, Beasley School

Major
Law--Full Time

Student Type
Continuing Degree Seeking

Additional Standing
Dean's List

Term Comments
Semester Notations:

DCP (Criminal Procedure I)

OOA (Trial Advocacy I)

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	0460	Main	LW	Trial Advocacy I Jacobson, S	S+	2.000	0.00		
JUDO	0532	Main	LW	Criminal Procedure I	A+	3.000	12.00		

				Rangel-Medina, E			
JUDO	0540	Main	LW	Evidence Epstein, J	A	3.000	12.00
JUDO	0791	Main	LW	The Systemic Justice Clinic Sibley, R	S	4.000	0.00
JUDO	5064	Main	LW	The Systemic Justice Seminar Sibley, R	A	2.000	8.00

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	14.000	14.000	14.000	8.000	32.00	4.00
Cumulative	52.000	52.000	52.000	45.000	161.67	3.59

Term : 2023 Spring

College

Law, Beasley School

Major

Law--Full Time

Student Type

Continuing Degree Seeking

Academic Standing

Not Calculated

Last Academic Standing

Not Calculated

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	0461	Main	LW	Trial Advocacy II Leckman, T	S	3.000	0.00		
JUDO	0517	Main	LW	Civil Procedure II Jacobsen, K	A-	2.000	7.34		
JUDO	0717	Main	LW	Federal Crimnl: Defender	S+	3.000	0.00		
JUDO	0902	Main	LW	Guided Research Serial Margolis, E	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	11.000	11.000	11.000	5.000	19.34	3.87
Cumulative	63.000	63.000	63.000	50.000	181.01	3.62

Transcript Totals

Transcript Totals - (Law)	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Total Institution	63.000	63.000	63.000	50.000	181.01	3.62
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.00
Overall	63.000	63.000	63.000	50.00	181.01	3.62

Course(s) in Progress

Term : 2023 Spring

College

Law, Beasley School

Major

Law--Full Time

Student Type

Continuing Degree Seeking

Subject	Course	Campus	Level	Title	Credit Hours
JUDO	0835	Main	LW	Appellate Advocacy	3.000

Term : 2023 Fall

College

Law, Beasley School

Major

Law--Full Time

Student Type

Continuing Degree Seeking

Subject	Course	Campus	Level	Title	Credit Hours
JUDO	0416	Main	LW	Professional Responsibility	2.000
JUDO	0759	Main	LW	Federal Appellate Litigation Clinic	2.000
JUDO	0932	Main	LW	Criminal Procedure II	3.000
JUDO	1080	Main	LW	Legal Research Writing III: Legal Drafting Seminar	3.000
JUDO	5037	Main	LW	Federal Appellate Litigation Seminar	2.000

May 25, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing this letter to strongly recommend that you hire Don Arrington for a clerkship in your chambers. I got to know Don over the course of his summer internship with the Appellate Division at the D.C. Public Defender Service (PDS), where I am a staff attorney. Don's work was excellent and extremely helpful for me, my colleagues, and most importantly, our clients. I am certain that he will be an outstanding attorney and, if given the opportunity, a tremendous asset to your chambers.

I had the chance to see Don's intellect, diligence, and collegial attitude on display when we collaborated on a sentence-modification motion for one of my clients. Don took the lead on drafting the motion under my supervision. The assignment was not an easy one. Don had to quickly familiarize himself with the D.C. statutory scheme for compassionate release and how it differs from the federal compassionate release scheme; get up to speed on the procedural posture for a case that had gone back and forth between the trial and appellate court several times; research and find support for a novel legal theory; and finally, draft a motion that would tie everything together persuasively and succinctly. Don tackled the assignment with enthusiasm, and his work met the challenge in all respects. He quickly wrote a great first draft of the motion. Then, as we edited the motion together, Don asked incisive questions, found cases that perfectly supported our arguments, and carefully revised the motion to ensure that it was clear and compelling.

Don's work on the sentence-modification motion was typical of the rest of his work at PDS and showcases the legal skillset that I'm sure will make him an excellent law clerk. He quickly synthesizes complex legal concepts and voluminous records. He deftly strikes the balance between fast and thorough research. His writing is clear and compelling. And he is a detail-oriented, conscientious editor who is exceedingly easy to work with.

Don's strengths as a collaborator and colleague bear particular emphasis. Regardless of the task at hand, he approaches his work with humility and zeal, reflecting a deep commitment to social justice that motivates him to continually sharpen his already considerable skills. Just as importantly, he has a quiet, easygoing nature that quickly earned him the respect and admiration of everyone in our office, from his fellow interns to seasoned attorneys. I would be thrilled to work with him again.

In short, I think Don would make an excellent law clerk. I hope and urge that you will give him an opportunity to work in your chambers. If there is any other information that I can provide about Don, please do not hesitate to contact me at pmaneri@pdsdc.org or 202-336-4094.

Sincerely,

Paul Maneri (he/him/his)

Staff Attorney, Appellate Division

pmaneri@pdsdc.org

202-336-4094

May 25, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write this letter in support of the clerkship application of Don Arrington. I recommend Mr. Arrington enthusiastically and without reservation.

I was the faculty chair of the Temple Law Admissions Committee when Mr. Arrington applied. We actively recruited Mr. Arrington and awarded him our most prestigious three-year full-tuition scholarship and named him a Rubin-Presser Public Interest Scholar. We were thrilled when he accepted, and we most certainly have not been disappointed. Mr. Arrington is an extremely talented law student who engages the law with enthusiasm, professionalism, and a keen attention to detail. He is also an excellent and persuasive writer and advocate with first-rate research and analytic skills.

I have been working closely with Mr. Arrington since his first year of law school when he applied for our highly prestigious Law & Public Policy (L&PP) Program for students interested in a career in public service. That year, we had three times as many applications as we had spots. As a L&PP Scholar, Mr. Arrington secured an internship with the DC Defenders Office and wrote an excellent policy paper on prosecutorial discretion and plea bargains. Given his performance in my classes, I was not at all surprised when he secured a spot on our Moot Court Team.

At the Law School, Mr. Arrington has assumed multiple leadership positions and single-handedly revitalized our Political & Rights Society. With Mr. Arrington's grades and accomplishments, he could have easily secured a job for his 2L at a large law firm, but he is committed to pursuing a career in public service. This summer he will be working for the Federal Public Defender's Office of the District of New Jersey.

In short, Mr. Arrington is an exceptional law student. He is also extremely kind, thoughtful and generous with his time. I know that he will be an excellent lawyer and a wonderful colleague. Please do not hesitate to contact me if there are any questions concerning his qualifications or abilities.

Sincerely,

/s/ Nancy J. Knauer

Nancy J. Knauer

SHELLER PROFESSOR OF PUBLIC INTEREST LAW

DIRECTOR, LAW & PUBLIC POLICY PROGRAM

Nancy Knauer - nancy.knauer@temple.edu - 215-204-1688

Don Arrington
10 Windward Dr., Barnegat, NJ 08005 | 732-779-4276 | don.arrington@temple.edu

WRITING SAMPLE

The attached writing sample is an excerpt from an assignment in my Appellate Advocacy class this past semester. The assignment required drafting a brief to the Pennsylvania Supreme Court analyzing whether an injunction that required one neighbor ("the Galapos") to turn their anti-hate messaging signs so that another neighbor (the Oberholzers") could not see them is (1) an impermissible prior restraint under Article I, Section 7 of the Pennsylvania Constitution; and/or (2) a content-based restriction and, therefore, subject to strict scrutiny. This is based on a real-world case that will be argued in the Pennsylvania Supreme Court this fall. I conducted all the research necessary for the assignment and the writing is entirely mine. The attached excerpt contains the Argument section of the brief.

I. ARGUMENT

The injunction forces the Galapos to move their anti-hate messaging signs and violates their fundamental Free Speech rights under both Article I, Section 7 of the Pennsylvania Constitution, and the Free Speech Clause of the First Amendment to the United States Constitution. The Galapos have removed and added signs when they felt it necessary to express their views on racism and antisemitism, in response to the Oberholzers. The injunction prohibits the Galapos from using signs to respond to racist harassment in the future and is an improper prior restraint under Article I, Section 7 of the Pennsylvania Constitution. Moreover, because the entire litigation and justification for the injunction is premised on the Oberholzers' objections to the content of the signs, the injunction is a content-based restriction on speech. Accordingly, the injunction is subject to strict scrutiny, which it cannot survive.

A. The Injunction Is an Impermissible Prior Restraint on Speech in Violation of Article I, Section 7 of the Pennsylvania Constitution.

This Court has repeatedly held that Article I, Section 7 of the Pennsylvania Constitution grants more protection to the speech of citizens than its federal counterpart. *See, e.g., S.B. v. S.S. (In re S.S.),* 243 A.3d 90, 112 (Pa. 2020); *Pap's A.M. v. City of Erie,* 812 A.2d 591, 605 (Pa. 2002). Article I, Section 7[1] "prohibits

[1] "The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to

prior restraint . . . of an individual's right to freely communicate thoughts and opinions." *Willing v. Mazzocone*, 393 A.2d 1155, 1157 (Pa. 1978). The injunction forces the Galapos to position their anti-hate messaging signs so the Oberholzers cannot read them. R.R. at 88. The trial court, thus, enjoined the Galapos' future speech, resulting in an impermissible prior restraint.

1. Because the injunction limits the direction in which the Galapos can point their signs, it prohibits the Galapos' future communication, making it a prior restraint.

The Galapos' sole purpose for posting anti-hate messaging signs and positioning them to face the Oberholzers' property is to protest the racist behavior of the Oberholzers. *See* R.R. at 3, 151, 153, 155. This is evidenced by the Galapos' taking the signs down and putting them back up based on whether the Oberholzers' racist behavior toward them ceased or was ongoing. *Id.* at 4, 27, 55, 83, 141, 147. Requiring the Galapos to turn their signs away from the target of their future protest is an unlawful prior restraint.

The Pennsylvania Superior Court has previously ruled that an injunction that prevents speech critical of its target is an impermissible prior restraint. *Cf. Franklin*

---

restrain the right thereof. *The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.* No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases." Pa. Const. Art. I, § 7 (emphasis added).

Chalfont Assocs. v. Kalikow, 573 A.2d 550, 557 (Pa. Super. Ct. 1990). In *Franklin*, as here, citizens used signs to criticize the target of their speech by placing signs on their own property. *Id*. at 553-54. The Superior Court reversed an injunction that prohibited these signs because it was a prior restraint. *Id*. at 557. Like the plaintiff in *Franklin*, the Oberholzers sought to enjoin the speech of the Galapos because they were annoyed and thought it was critical of them. *See id.* But that is not enough. No court in the state of Pennsylvania has held that protest signs or signs of public importance may be enjoined merely because the signs are critical of the target who is annoyed. Here, the placement of signs on the Galapos' property has not interfered with the Oberholzers use of their property. They are simply annoyed by having to see them. *See* R.R. at 3.[2]

Here, the lower court relied on the fact that prior restraint jurisprudence examines restrictions on "future communication" and concluded that because the injunction restricts signs that were already up, it was not restricting future speech. *Id.* at 106. However, the signs were ever-changing. *See id.* at 4, 27, 55, 83, 141, 147. The Galapos added and removed signs responsive to the racist actions of the Oberholzers. *See id.* at 151, 147. The court recognized the ever-changing nature of

[2] The fact that these signs were directed at the Oberholzers' home does not change the outcome. This Court has held that in certain circumstances a "residence is not an unreasonable . . . [place] to picket." *See, e.g., Hibbs v. Neighborhood Org. to Rejuvenate Tenant Hous.*, 252 A.2d 622, 623-24 (Pa. 1969).

the signs, and carefully considered the way the Galapos added and removed them. *Id.* at 97-98. Yet it still placed a restriction on future responsive speech through those signs. *Id.* at 106. The restriction prohibits the Galapos from turning the signs toward their antagonists, should another racist action be directed at them. *Id.* For that reason, the injunction here, unlike in the cases relied on by the lower court, discussed *infra*, is a prior restraint prohibiting the future speech of the Galapos. *See, e.g., Franklin* 573 A.2d at 557. The future speech is the Galapos taking signs down when the Oberholzers' racist behavior stops, or putting signs back up when the Oberholzers' racist behavior persists or worsens and directing the signs toward the Oberholzers. R.R. at 141, 157. Such a prior restraint is impermissible.

2. Because the Galapos' signs are stationary and on their own personal property, they are not violating the Oberholzers' residential privacy.

The lower court compared the injunction to the "residential picketing" line of cases. *See, e.g.*, R.R. at 107, 112-116. However, the facts of this case are distinguishable. Those cases focused on: i) the disturbance and lack of privacy that the targets of residential picketing experienced; ii) the perceived threatening actions of the picketers to the targets and their families; and iii) the fact that the actions of the picketers took place in public fora. *See, e.g., SmithKline Beecham Corp. v. Stop Huntingdon Animal Cruelty USA*, 959 A.2d 352, 358 (Pa. Super. Ct. 2008) (discussing that "the harassing, intrusive and threatening nature of the

protests . . . outside of the Individual Plaintiffs' houses" gave rise to a residential picketing injunction); *Klebanoff v. McMonagle*, 552 A.2d 677, 678 (Pa. Super. Ct. 1988) (holding that "public streets and sidewalks" are "quintessential public forum"). These differences highlight the fact that the Oberholzers' residential privacy rights were not violated.

i. Nothing in the record indicates that the Oberholzers have experienced a disturbance or lack of privacy because of the anti-hate messaging signs on the Galapos' property.

The Galapos' signs have not disturbed the Oberholzers' residential privacy. Generally, courts may restrict individuals' free speech rights when their "focused . . . residential picketing" forces a "captive" resident to be subjected to the "objectionable speech" of an "unwelcome visitor at the[ir] home." *Frisby v. Schultz*, 487 U.S. 474, 487-88 (1988); *see also Klebanoff*, 552 A.2d at 678. However, courts may only do so when the restricted speech is invading another person's privacy rights. *Cf. Klebanoff*, 552 A.2d at 679. In determining whether a resident's privacy rights have been violated, courts have looked to whether there has been a significant disturbance to the target of the picketing. *See id.* (discussing, among other things, that a picketer "attempted to taunt him into physical confrontation"); *see also Smithkline*, 959 A.2d at 359 (discussing, among other things, that "protestors wore masks, used bullhorns, shouted obscenities and threats, and even hit . . . [an] employee over the head with a placard"); *see also*

Frisby, 487 U.S. at 487 (discussing, among other things, the gathering of "a relatively large group of protestors on . . . [the target's] doorstep").

But the signs here do not rise to that level of disturbance. The Oberholzers are not captive. The Galapos' signs face the Oberholzers' *backyard*. R.R. at 3-8. The Galapos have only placed signs in their own yard. *Id.* The Galapos have invited no protestors, nor have they themselves gone outside to protest. *Id.* They are not yelling anything at the Oberholzers, nor moving around the street in front of their home. *Id.* Unlike the targets of picketing in *Frisby*, *Smithkline*, and *Klebanoff*, the Oberholzers *can* retreat into their home to avoid looking at the signs if they wish. *Id.* They can also avert their eyes instead of looking into the Galapos' yard, *see Cohen v. Cal.*, 430 U.S. 15, 21 (1971), or they can build a fence to block the view.

ii. There is nothing threatening about the Galapos signs or actions, the Oberholzers are merely offended by the signs' content.

The cases involving prior restraints and residential picketing hinge on the public policy goal of protecting residential privacy. *See, e.g.*, *Murray v. Lawson*, 649 A.2d 1253, 1263 (N.J. 1994) ("the injunction was entered pursuant to the court's authority to grant equitable relief to enforce a valid public policy of this state"); *Frisby*, 487 U.S. at 487 (finding that the "primary purpose of . . . [the] ban" was "the protection and preservation of the home"); *Klebanoff*, 552 A.2d at 679

(reasoning that a residential picketing injunction "protects . . . the individual's right of privacy"); *SmithKline,* 959 A.2d at 359 (holding that the lower court's injunction banning "protesting or congregating at the homes of plaintiffs" was "properly issued" to "protect the[ir] privacy interests").

These cases, however, have turned on the threatening behavior of the residential picketers. *Frisby*, 487 U.S. at 487 (highlighting that a "large group of protestors" were on the doctor's "doorstep in an attempt to force . . . [him] to stop performing abortions"); *Klebanoff*, 552 A.2d at 679 (holding that "the protestors" had "succeeded in their express aim to create a crisis in Dr. Klebanoff's life" because he was fearful of violence after receiving threats (internal quotations omitted)); *SmithKline*, 959 A.2d at 358-59 (discussing that residents felt "bullied and scared in their . . . homes" because of the threatening nature of the protests and actual threats and physical violence from protestors).

Here, unlike the protestors in those cases, the Galapos have done nothing threatening to the Oberholzers, nor have they written anything threatening on their anti-hate messaging signs. *See* R.R. at 3-8. They have merely put signs on their own property. *See id.*

iii. The Galapos' signs are on their own residential property, not public fora, therefore the injunction is infringing on the Galapos' property rights.

These signs were not placed in public. They were placed on the Galapos' own private property where they have a constitutional right to express themselves. Pa. Const. art. I, § 1; Pa. Const. art. I, § 7. The Pennsylvania Constitution provides a right of property owners to "possess[] and protect[] [their] property." *Commonwealth v. Tate*, 432 A.2d 1382, 1389 (Pa. 1981) (quoting Pa. Const. art. I, §1). "This Court has recognized that the right to possess and use property . . . is one of the Hallmarks of Western Civilization." *Tate,* 432 A.2d at 1389 (quoting *Andress v. Zoning Bd. of Adjustment*, 188 A.2d 709, 713 (Pa. 1963)) (internal quotations omitted).

When a court enjoins "particular individuals" from engaging in lawful speech, especially when they are doing so on their own property—it "is an unconstitutional prior restraint." *See Lawson v. Murray*, 515 U.S. 1110, 1111 (1995) (Scalia, J., concurring in denial of certiorari). The Galapos are legally permitted to display signs promoting anti-hate messaging on their property.

The injunction interferes with their right to express themselves on their own property. In the past courts have upheld restrictions on speech in residential neighborhoods when, among other things, the speech was taking place in public fora such as sidewalks and streets. *See Frisby*, 487 U.S. at 480 (holding that

residential sidewalks and streets are public fora); *see also Klebanoff*, 552 A.2d at 678 (compiling cases that have held that streets and sidewalks are public fora). Here, however, the Galapos did not place any signs on a public sidewalk or public street. The Galapos did nothing else on a public sidewalk or street (or any other public forum). The Galapos merely placed signs on their own private, residential property.

B. The Injunction Is Content-Based. Therefore, It Is Subject to Strict Scrutiny Which It Cannot Survive.

The trial court's injunction targeting the Galapos anti-hate messaging signs is a content-based restriction, subject to strict scrutiny. The Oberholzers sought the injunction because they were bothered by the content of the signs. The injunction restricted the Galapos' speech on an issue of public importance and cannot survive strict scrutiny.

The Free Speech Clause of the First Amendment of the United States Constitution, which applies to the states through the Fourteenth Amendment, prohibits the government from "abridging the freedom of speech." U.S. Const. amend. I.[3] The government may not "restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163

[3] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech,* or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I (emphasis added).

(2015). When the government restricts "speech based on" the content it communicates the restriction is subject to strict scrutiny which means it must be "narrowly tailored to serve compelling state interests." *Id.* The trial court's injunction does not serve a compelling state interest. It serves the Oberholzers' personal, emotional interest. Thus, the injunction cannot withstand strict scrutiny and it violates the Galapos' First Amendment right to freedom of speech.

1. The Oberholzers moved to enjoin the placement of the signs because they were offended by the signs' messaging; thus, the injunction is content-based.

A restriction of speech is content-based even when it appears to be content-neutral on its face, if it can only be "justified with[] reference to the content of the . . . speech," or if it was imposed "because of disagreement with the message [it] conveys." *Reed*, 576 U.S. at 163-64 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Here, the Oberholzers sought an injunction solely because they did not agree with and were offended by the messaging of the signs. *See* R.R. at 3-8. In granting the injunction, the trial court imposed an impermissible content-based[4] restriction "because of [the Oberholzers'] *disagreement with the message*

[4] Although the injunction does not mention what the signs may or may not say, it restricts the messaging of the signs because the message of the signs is the primary issue of the litigation as evidenced by the Oberholzers' original complaint which listed what each sign said. *See* R.R. at 3-8; *see also id.* at 83 ("These signs vary with regard to their language, but their messages clearly decry racism, some with references to Hitler and the Holocaust."). Therefore, the injunction cannot be "justified without reference to the content" of the signs making the injunction content-based for the purposes of First Amendment analysis. *See Reed*, 576 U.S. at 163-64.

convey[ed].” *Reed*, 576 U.S. at 163-64 (quoting *Ward*, 491 U.S. at 791) (emphasis added).

The longstanding and well-recognized freedom to convey ideas “in the home” and on private property is deeply ingrained in our cultural values which place emphasis on “respect[ing] . . . individual liberty.” *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994). There is a “strong . . . presumption” against the regulation of “private citizens[’] . . . speech,” particularly when that speech happens “*on private property*.” *Id*. at 59 (O’Connor, J., concurring) (emphasis added). The choice to display signs with meaningful content on one’s own property—particularly when that property is one’s home—makes the messages that the signs convey more meaningful than if they were displayed elsewhere. *See id.* at 56. Placing a sign on residential property combines “the identity” of the homeowner with the message of the sign, which transforms or enhances the meaning of the sign. *See id.* For example, a sign that proclaims “Black Lives Matter” on the front porch of a decorated and experienced African-American police officer would “provoke a different reaction than the same sign in a 10-year-old child’s bedroom window” or the same message on a bumper sticker on a white college student’s car. *Id.* at 56-57. Moreover, placing a sign in one’s yard is an affordable and “convenient” way to communicate one’s ideas. *See id.* at 56-57. It is perhaps the easiest avenue to

"participat[e] . . . in" a "public debate." *see id.* at 57, and reach one's audience when one's intent is that one's message "reach [one's] neighbors." *See id.*

That is precisely what the Galapos did. They put signs up on their *own* property. R.R. at 3. And the signs conveyed a greater meaning because they were placed there. *See City of Ladue*, 512 U.S. at 56. Their Jewish identity and the tense racial situation with the Oberholzers transformed the meaning of the Galapos' signs making them even more meaningful. *Id.*

Because the Oberholzers were offended by the meaning and message of the signs, they filed a lawsuit that led to the injunction. *See* R.R. at 3-8. And that injunction prevents the Galapos from conveying their ideas, participating in the public debate over racism in our society, and reaching their intended audience. R.R. at 88. This inhibits their individual liberty to do with their home what they would like.

2. Racism and antisemitism are clearly matters of public importance and concern.

The First Amendment protections of speech are strongest when protecting speech on and about matters of public importance and concern. *See, e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). The protections of the First Amendment reflect our Nation's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Robust debate,

speech, and the exchange of ideas "concerning public affairs is more than self-expression; it is the essence of self-government." *Dun & Bradstreet v. Greenmoss Builders Inc.*, 472 U.S. 749, 759 (1985) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (internal quotations omitted)). When a person speaks about issues that are important to the public, that speech "occupies the highest rung of the hierarchy of First Amendment values and . . . is entitled to special protection." *Id.* at 759 (quoting *NAACP*, 458 U.S. at 913 (internal citations omitted)).

It is undeniable that antisemitism and racism are matters of public importance and are on the rise in the United States. *See, e.g.*, Patty Housman, *Antisemitism at New All-Time High in US*, American University, Jan. 13, 2023, https://www.american.edu/cas/news/antisemitism-at-new-all-time-high-in-us.cfm; *ADL Audit Finds Antisemitic Incidents in United States Reached All-Time High in 2021*, Anti-Defamation League, April 25, 2022, https://www.adl.org/resources/press-release/adl-audit-finds-antisemitic-incidents-united-states-reached-all-time-high; Nikki McCann Ramirez, *Law Enforcement Warns of Potential Neo-Nazi 'Day of Hate,'* Rolling Stone, Feb. 24, 2023, https://www.rollingstone.com/politics/politics-news/day-of-hate-prompts-warnings-police-jewish-groups-1234686596/; Michael Edison Hayden, *White Nationalists and Neo-Nazis Applaud Recent Spate of Antisemitic Attacks*, Southern Poverty Law Center, Jan. 10, 2020,